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Supreme Court, U.S.
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No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

Hispanic Broadcasting Systems, Inc.,
a Delaware corporation,
Petitioner,

v.

Federal Communications Commission,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals could properly create requirements, in addition to those specified in the statute for exhaustion of administrative remedies, which mandate premature filings and participation in administrative proceedings for the sole purpose of meeting the additional requirements.

2. Whether the Court of Appeals' requirement of preventive participation wrongfully elaborates the doctrine of exhaustion of administrative remedies.

3. Whether the Court of Appeals' requirement of preventive premature participation to preserve future rights impermissibly burdens access to, and the orderly operation of, the administrative process.

LIST OF INTERESTED PARTIES

The following parties appeared before the United States Court of Appeals for the District of Columbia Circuit in the proceedings below:

Hispanic Broadcasting Systems, Inc.
TVL Corporation
Coalition for the Preservation of Hispanic Broadcasting
Hispanic Broadcasting Limited Partnership
Susan M. Jaramillo
Federal Communications Commission
Station Representatives Association, Inc.
Seven Hills Television Co.
Fouce Amusement Enterprises, Inc.
Spanish International Communications Corp.*
Univision Holdings, Inc.*
Bahia de San Francisco Television Co.

*Subsidiary of Hallmark Cards, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Hispanic Broadcasting Systems, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on April 23, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit *(en banc)* is reported as Coalition for the Preservation of Hispanic Broadcasting v. FCC, at 931 F.2d 74, and is reprinted as Petitioner's Appendix A. The panel decision of the Court of

Appeals for the District of Columbia Circuit is reported at 893 F.2d 1349, and is reprinted as Petitioner's Appendix B. The Commission's decision is reported as Spanish International Communications Corporation, 2 FCC Rcd. 3336 (1987), and is reprinted as Petitioner's Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

47 U.S.C. §405(a) provides in pertinent part:

"After an order, decision, report, or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration . . .

* * *

. . . The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. . . .

STATEMENT OF THE CASE

Petitioner seeks review of an en banc decision of the Court of Appeals for the District of Columbia Circuit which denied petitioner relief for failure to exhaust its administrative remedies. Notwithstanding petitioner's compliance with the governing section of the Communications Act, 47 U.S.C. §405, and with all known standards of exhaustion, the court below held that HBS had not done enough. The court elaborated a rule of exhaustion of administrative remedies which ousted petitioner from judicial review for failure to file its applications eight years previously at the earliest opportunity.

Television stations are licensed by the Federal Communications Commission ("FCC" or "Commission") to operate for a period of five years. The Communications Act governs the Commission's actions and provides criteria respecting the qualifications of licensees.[1] When a broadcaster applies for renewal of its license, other parties seeking the license may also file competing applications. Unless a competing applicant is found unqualified, it will be compared by the Commission against other qualified applicants to determine which applicant should be awarded the license. If no competing application is filed, an applicant for renewal may nonetheless be subjected to hearing on its qualification to remain a licensee. If found unqualified where there is no competing applicant, the license is not renewed and the channel is declared vacant and open to new applicants.

In June of 1983, the Commission designated for

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[1] Among other qualifications, section 310 of the Act prohibits the FCC from granting a license to an applicant more than 20% owned, directly or indirectly, by aliens.

hearing on qualifications, the renewal applications of seven television stations, among them five licensed to Spanish International Communications Corp. ("SICC").[2] Among the issues specified in the order was whether SICC was controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act.[3]

After an extensive hearing, an administrative law judge's Initial Decision in January 1986, found a violation of Section 310(b), rendering SICC unqualified to remain a licensee, and denied SICC's renewal applications. SICC and other parties appealed the Initial Decision to the Review Board. While the appeals were before the Review Board, SICC announced a settlement agreement which proposed that the stations be sold to Hallmark Cards, Inc.[4]

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[2] Spanish International Communications Corp., 48 Fed. Reg. 28549 (June 22, 1983).

[3] 47 U.S.C. §310(b). "No broadcast . . . license shall be granted to or held by-- . . . (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives . . . or by any corporation organized under the laws of a foreign country. . . ."

[4] The Review Board is comprised of members of the Commission's staff; its decisions may be appealed to the Commission. Exceptions to the Initial Decision were filed with the Review Board on April 16, 1986. Despite its disqualification, SICC sought buyers for the company in May and, on June 23, 1986, informed the Review Board that an agreement had been reached which was supported by the Commission's Mass Media Bureau. A joint petition seeking approval of the settlement agreement and a grant of the renewal applications was filed with the Review Board by SICC, the Mass Media Bureau and related parties on August 19, 1986.

On September 26, 1986, while the appeals and the proposed sale were pending before the Review Board, HBS filed applications for the five channels held by SICC.[5] HBS said that acceptance of the applications was appropriate because each of the channels should be deemed vacant, and that the proposed sale was invalid because SICC had no licenses to transfer unless the finding of alien control was reversed.[6] The Review Board's decision approved the sale, but left in place the findings and conclusions of the Initial Decision that SICC was unqualified to remain as a licensee due to its violation of Section 310(b). Interested parties filed for Commission review of the Review Board decision.

The Commission's Decision

The Commission's decision, issued June 1987, addressed both the Review Board decision and HBS' petition to accept its applications. With respect to the former, the Commission declined to address, much less overrule or modify, the Initial Decision's findings and conclusions. The Commission also assumed as the predicate for its action the conclusion "that these licensees have violated the statute and that they are basically unqualified," but, even so, affirmed. Pet. App. C, p. 81a; 2 FCC Rcd. 3336, 3339.

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[5] At the same time, HBS filed with the Commission a Petition for Acceptance of Applications and a Petition to Deny the applications to transfer control of SICC to Hallmark.

[6] HBS further argued that the proposed sale was barred by a long-standing FCC policy precluding a sale until an applicant whose qualifications are under scrutiny is found qualified to hold the licenses. See Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964).

The Commission denied HBS' petition for acceptance, dismissed its applications as unacceptable for filing, denied the applications for review of the Review Board's decision, and, ignoring the finding of illegal alien ownership, granted SICC conditional renewal of its licenses. The Commission treated HBS' applications as applications for comparative consideration with SICC's applications for renewal and applied its cut-off rules.[7] Relegating HBS' argument to a footnote, the FCC mischaracterized it, and then rejected it.[8] Relying solely upon Section 1.65 of its Rules and without reference to any precedent, the Commission held that so long as its order were subject to appeal, the proceeding remains in active hearing status and, therefore, the channels were not yet vacant

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[7] The FCC specifies a date by which applications must be filed to compete with an application on file and after which further applications are "cut off." See 47 C.F.R. §73.3516(e). Of the five SICC applications, two were filed in 1980; two, in 1981; and one, in 1983. The last cut-off date for applications competing with the five applications was July 1, 1983. If the FCC has failed to act on a pending renewal application for the entire term of the license, the licensee is required to supplement its application with an update. At that time a "window" is opened for competing applications, just as if an application were being filed. However, as was the case with respect to SICC's applications, the supplement is not required if the renewal application is in "active hearing status" and, thus, no window is opened for competing applications.

[8] Pet. App. C, p. 69a n. 7; 2 FCC Rcd. 3336, 3342, n. 7. The Commission characterized HBS as claiming that the case was no longer in active hearing status because a settlement agreement was pending before the Commission. HBS actually said that the channels should be treated as vacant for the purposes of new applications because the channels were held by an unqualified licensee and the Commission was permitting the unqualified licensee to sell the stations.

and available for applications.[9]

Appeal to the Court of Appeals

On appeal, HBS sought reversal of the Commission's decisions authorizing the settlement, renewing the licenses and permitting the sale to Hallmark, and dismissing HBS' applications. In a consolidated brief, HBS argued that the Commission erred in granting renewal of SICC's licenses because SICC had been found in violation of Section 310(b) of the Act. In view of the undisturbed finding and conclusion of a violation of that section, HBS argued that the Commission lacked any authority to renew SICC's licenses.

The Commission defended its failure to accept HBS' applications by relying on its cut-off rules. Under those rules, HBS was tardy in filing applications to be considered comparatively with SICC's renewal applications. At the same time, the Commission said HBS' applications were premature for any potential vacancy because the decision was not final and §307(c) of the Act requires that the license continue in effect.[10] The Commission for the first time questioned appellants' standing, arguing that if the dismissal of HBS' application were upheld, HBS would lack

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[9] Rule 1.65, 47 C.F.R. §1.65, governs required updating of information provided by applicants so long as the application is "pending." While the rule considers an application to be pending until it is no longer subject to further review, the section expressly limits the definition of "pending" as applying to that section alone.

[10] 47 U.S.C. §307(c). The section states, in pertinent part: "Pending any hearing and final decision on [a renewal] application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect."

standing to contest the merits of the settlement.

In its response, HBS stressed the irrelevance of the cut-off rules and §307(c) to its application, citing similar circumstances in MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257 (D.C. Cir. 1968), HBS said:

> HBS did not file its applications for SICC's television channels for the purpose of obtaining comparative consideration with SICC's applications for renewal of its license for those channels. Rather it did so in response to the administrative law judge's finding SICC in violation of Section 310(b) and denying its pending applications for renewal of licenses for those channels. In the wake of these findings, the channels previously licensed to SICC became available for application by HBS or other parties.

(HBS Reply at 6-7).

Further, irrespective of whether its earlier applications were properly dismissed, HBS asserted that it had standing to contest the license renewal and approval of the sale, citing MG-TV. A denial of the SICC renewal would leave the channels vacant and available for HBS' applications.

The Panel Decision

The panel's decision found that HBS had standing to challenge the FCC's approval of the settlement agreement. While it upheld the Commission's decision not to accept HBS' applications, the panel rejected the Commission's arguments that HBS would lose its standing if the Commission had properly dismissed

HBS' applications:[11]

> The Commission argues that, assuming we uphold its denial of the competing applications, none of the petitioners have standing as prospective competitors for the SICC licenses. It conceded at oral argument that if a reversal of its orders would result in vacant licenses, companies eligible to file applications for those licenses would have standing to challenge the Commission's order. See, e.g., MG-TV Broadcasting v. FCC, 408 F.2d 1257, 1264 n. 24 (D.C. Cir. 1968) (prospective applicant had standing to challenge assignment of a construction permit where denial of the application would have left the station vacant and available for other applications). The Commission argued, however, that MG-TV is limited to cases where the license could become available directly as a result of the court's order. We reject this distinction.

Pet. App. B, p.35a; 893 F.2d at 1355.[12]

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[11] The court mistakenly assumed that HBS had filed its applications to compete with SICC and that HBS did "not challenge that ruling before this court." Pet. App. B, p. 32a; 893 F.2d at 1354.

[12] No doubt because it mistakenly thought that HBS has conceded the matter, the panel did not apply MG-TV to the question of whether HBS' application should have been accepted. That case involved an application by MG-TV which was rejected as untimely because the FCC had pending a sale of an existing permit to a third party, even though construction of the station had not begun by the permit's expiration date. Section 319 of the Communications Act provides that a construction permit "shall . . . be automatically forfeited" if the station is not built within the time specified. The court held that MG-TV's application could not be rejected by the FCC because the FCC had not acted properly with respect to allowing the sale.

On the merits, the panel reversed the Commission. It declined to address HBS' contention that the FCC lacked statutory authority to grant a license to SICC in view of the undisturbed determination that SICC was in violation of Section 310(b). Instead, it found that the Commission violated its policy as upheld in Jefferson Radio Co. v. FCC, 340 F.2d 781 (D.C. Cir. 1964).[13]

Judge Williams dissented to the majority's holding that HBS had standing to challenge the Commission's approval of the settlement.[14] In the dissent, no mention was made of the exhaustion doctrine. The dissent erroneously stated that the FCC's cut-off rule would not "kick in" until the SICC applications were designated for hearing and faulted HBS for not applying at that time. Pet. App. B, p. 55a-56a; 893 F.2d at 1364-65.[15]

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[13] "HBS argues that §310(b) absolutely precluded the Commission from granting a license to SICC for any purpose after the ALJ's finding of de facto alien control. We need not resolve these questions, however, because we find that the Commission violated its policy as upheld in Jefferson Radio." Pet. App. B, p. 43a-44a; 893 F.2d at 1359. The court summarized the policy as "forbidding assignment at full value of broadcast stations by a licensee, whose qualifications are under investigation, until the Commission has determined that the licensee has not forfeited its broadcast authorization." Pet. App. B, p. 27a; 893 F.2d at 1351.

[14] The dissent also mistakenly thought that HBS did not challenge "the Commission's dismissal of its belated applications." Pet. App. B, p. 58a; 893 F.2d at 1365-66.

[15] In fact, section 73.3516(e) of the Commission's Rules [miscited by the dissent] requires that a competing application be filed a month before the end of the expiring license term. See 47 C.F.R. §73.3516(e).

The Decision *En Banc*

The court below, *en banc*, agreed to hear the Commission's Petition for Rehearing, which sought to overturn both the panel's holding that HBS had standing to challenge the Commission's approval of the settlement and its holding vacating that approval. Its decision, however, authored by the dissenting judge on the panel, disregarded these issues and, instead, sua sponte, reversed the panel without reaching the issue of standing by evolving a novel theory of the doctrine of exhaustion of administrative remedies.

The court acknowledged that HBS met the statutory exhaustion requirements of Section 405(a) of the Communications Act, 47 U.S.C. §405, but took the position that the Congressional scheme was but "*one* prerequisite to judicial review." Pet. App. A, p. 8a; 931 F.2d at 76. The court then created additional requirements for exhaustion.

The court accepted the panel's holding that HBS' applications were untimely.[16] It then held that in order to exhaust its administrative remedies, "[a]n applicant for a broadcast license must file a timely application with the FCC before he may challenge an adverse Commission order in this court." Pet. App. A, p. 9a; 931 F.2d at 77. A "timely" application, in the court's view, would have been a competing application filed within the cut-off period following an incumbent's application for renewal. The court thought that such

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[16] The opinion assumed as its premise the correctness of the panel's holding that the applications were untimely and did not examine the applicability of MG-TV, supra, to the issue of timeliness. It ignored HBS' explanation that it was not seeking comparative consideration with SICC, but had applied only after SICC had been declared unqualified. Pet. App. A, p. 6a-7a; 931 F.2d at 76.

early involvement "could have mooted the issues [alien ownership] fueling this litigation," because the competing applicant "could have won the licenses without winning that dispute and, moreover, could have failed to qualify for those licenses without losing it." Pet. App. A, p. 10a; 931 F.2d at 78.

It was not enough that HBS filed its applications soon after the ALJ ruled that the incumbents were unqualified, even though "their presentation to the Commission of the theories that they raise here, and the Commission's consideration of those theories, satisfies §405 . . . ." Pet. App. A, p. 8a, n. 2; 931 F.2d at 77, n. 2. To meet the new test, HBS would have had to file its first competing application with the FCC in 1980, and have prosecuted the application through the rigors of a comparative hearing at great expense and consumption of time, merely to ensure that it could obtain judicial review of a potential future unlawful act by the FCC.

As Chief Judge Mikva's cogent dissent noted, the new standard for exhaustion:

> . . . effectively requires parties with an interest in competing for vacant licenses to safeguard that interest by filing frivolous applications challenging incumbent license-holders.

Pet. App. A, p. 23a; 931 F.2d at 84 (Mikva, C.J., dissenting). He described the majority opinion succinctly as a "stepchild of exhaustion" which is "unsupported by precedent, undeveloped by the court, and unresponsive to the facts of this case." Concerned about the perversion of an important doctrine, Chief Judge Mikva said:

> [T]he court should adhere to its practice of asking

> whether dismissal of a case on exhaustion grounds would further "the primary purpose of the exhaustion doctrine": preventing premature interruption of the administrative process. Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 104 (D.C. Cir. 1986). See Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 781 (D.C. Cir. 1984)(noting that avoidance of premature interruption is the "primary objective of the exhaustion doctrine," and stating that "[w]here . . . the goals of this requirement cannot be achieved, there obviously is no need for exhaustion"); . . .

Pet. App. A, p. 17a-18a; 931 F.2d at 81.

The dissent also recognized the statutory structure provided by Section 405 of the Communications Act, noting a long line of authority stating that the statute is a substitute for the judicially-created doctrine of exhaustion of administrative remedies. It implicitly recognized the preeminence of the statute, noting that if section 405 does not bar review, then prudential exhaustion requirements cannot bar review.

> [T]he only exhaustion requirement that Congress saw fit to impose in the Communications Act . . . [is] . . . Section 405 . . . .
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> * * *
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> The majority concedes that section 405, as construed in our cases, does not bar review of petitioners' claims. . . . Yet it fails to mention that this court has repeatedly held that section 405 "codif[ies] the judicially-created doctrine of exhaustion of administrative remedies." Washington

Ass'n for Television & Children v. FCC, 712 F.2d 677, 681 (D.C. Cir. 1983)). . . .

* * *

> If section 405 does not bar review, then the prudential exhaustion requirements that are incorporated within section 405 *cannot* provide a basis for dismissal of petitioners' claims.

Pet. App. A, p. 18a-19a; 931 F.2d at 81-82 (emphasis in originial). Chief Judge Mikva also specifically observed that "[t]he Commission addressed petitioners' arguments in the challenged decisions, making application of the exhaustion doctrine inappropriate." Pet. App. A, p. 20a; 931 F.2d at 82.

The majority's failure to address the importance of the FCC's Jefferson Radio policy to the implementation of its new exhaustion theory:

> HBLP and HBS, relying on prior statements of that policy, had no reason to anticipate Commission approval of a license transfer during the pendency of proceedings on the qualifications issue. Surprised in this way, HBLP and HBS did the only thing they could, opposing the settlement at all levels while filing applications for the disputed licenses.

Pet. App. A, p. 22a; 931 F.2d at 83. Chief Judge Mikva noted that it was inequitable to penalize a party for relying on the FCC to follow its own rules and policies by denying the party the right to challenge the FCC's failure to do so. He also pointed out that the majority's test is impossible to meet without taking on

an intolerable burden.[17]

IMPORTANCE OF THE CASE

This case has importance for several significant and related reasons stemming from the court's failure to follow the standard set forth in the Communications Act.

The practical impact of the court's abandoning the statutory scheme and embracing a theory of exhaustion which is founded upon judicial discretion is an exhaustion doctrine whose application cannot be limited to the FCC or its enabling statute. The procedural requirements established by the court thus threaten to bury the administrative process in protective actions throughout government.

The constitutional impact of the court's abandonment of the statutory scheme lies in the doctrine of separation of powers. While Congress chose to enact a specific requirement in Section 405 of the Communications Act, the court denigrates the Congressional scheme as only "*one* prerequisite" and erects additional formidable barriers not in keeping with the statute. If the legislature has made its choice of exhaustion requirements and has chosen a scheme where participation at the FCC and in judicial review is made to be widely available, then it is wrong for the court below to ignore that directive.

The court's abandonment of the statutory

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[17] "Must [those who would challenge FCC licensing decisions] seek every license up for renewal on the off chance that the incumbent licensee will be found unqualified, and that the license will be economically attractive at that hypothetical time?" Pet. App. A, p. 23a; 931 F.2d at 83.

requirement and its creation of a new theory of the exhaustion doctrine have led to an expanded requirement not in keeping with the decisions of other circuits, or even its own precedents. The court also departs from the fundamental purposes of the exhaustion doctrine, articulated repeatedly over the past half century, substituting instead a scheme which is both legally erroneous and poor public policy.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is an Impermissible Judicial Incursion into Matters Fully Addressed by Congress

The *en banc* opinion constitutes a judicial incursion into matters addressed fully by the legislative branch. The court acknowledged that HBS has satisfied the exhaustion requirement established by Congress in the statute,[18] but proceeded to disregard the legislated standard and to substitute its own.

The specific requirements set forth in Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405, are that a petition for reconsideration of an order directed to the Federal Communications Commission is required prior to judicial review only if the party seeking review was not a party to the proceedings resulting in such order, or if the party seeking review "relies on questions of fact or law upon which the Commission has been afforded no

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[18] "[Petitioners'] . . . presentation to the Commission of the theories that they raise here, and the Commission's consideration of those theories, satisfies section 405 . . . ." Pet. App. A, p. 8a, n. 2; 931 F.2d at 76-77, n. 2.

opportunity to pass."

Congress could have chosen statutory language which generally requires exhaustion of administrative remedies, as it has in other statutes.[19] It did not do so. Instead, Congress chose more limited language in keeping with the general thrust of citizen participation found in the Communications Act. By its action, Congress limited the scope of the exhaustion doctrine in review of Commission orders and, at the same time, made failure to meet its standard jurisdictional. Thus a court must dismiss an appeal where appellant failed to comply with section 405. Conversely, a court must not dismiss an appeal for exhaustion where appellant has complied with section 405.

This Court has held that the exhaustion requirement must be tailored to fit the peculiarities of the administrative system created by Congress. Parisi v. Davidson, 405 U.S. 34 (1972); McKart v. United States, 395 U.S. 185, 195 (1969). Thus the requirement must be viewed in light of the legislative intent in creating the scheme and, in particular, the specific requirements of the enabling statute. Weinberger v. Salfi, 422 U.S. 749, 765-66 (1975).[20]

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[19] See Washington Association for Television and Children v. FCC, 712 F.2d 677, 681-82, nn. 5 and 6 (D.C. Cir. 1983), for a discussion of the enactment of the relevant language in section 405 and of the various statutory exhaustion requirements.

[20] In determining that failure to meet statutory standards is jurisdictional, courts have repeatedly eschewed interference with the statutory scheme. Weinberger v. Salfi, supra, at 757; City of Peoria v. General Electric Cablevision Corp., 690 F.2d 116, 121 (7th Cir. 1982); Reid v. Engen, 765 F.2d 1457, 1462 (9th Cir. 1985)("Only if there is no statutory exhaustion requirement may we exercise our discretion to apply judicially-developed exhaustion rules."); Marathon Oil Co v. U.S., 807 F.2d 759 (9th Cir. 1986), *(continued...)*

The statutory language shows that Congress intended to place only a precise and narrow restriction on parties' ability to obtain judicial review of Commission orders. The court of appeals act of judicial activism, ignoring the Congressional scheme established by statute and imposing additional requirements upon parties seeking review, should not be permitted to stand.

II.

The Decision Below is Contrary to Precedent and is Inconsistent with the Purposes of the Doctrine

Even if the court were not bound by the statute, the decision below carries the discretionary exhaustion requirement far beyond existing precedent in its own circuit, not to mention other circuits, by creating a new element of exhaustion unrelated to the doctrine's purpose.[21] At no time since section 405 was amended in 1952 to include the specific exhaustion requirement has a court refused to treat on the merits a case where

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[20](...continued)
cert. denied, 480 U.S. 940 (1987); Morrison-Knudsen Co., Inc. v. CHG International, Inc., 811 F.2d 1209 (9th Cir. 1987), *cert. dismissed sub nom.*, FSLIC v. Stevenson Associates, 488 U.S. 935 (1988); Missouri v. Bowen, 813 F.2d 864, 871 (8th Cir. 1987). See also Natural Resources Defense Council v. EPA, 824 F.2d 1146, 1150 (D.C. Cir. 1987).

[21] This Court has disapproved invoking the exhaustion doctrine where, as here, the agency has developed the factual record and has had opportunity to consider the arguments before the court and where the use of the doctrine would require "a commitment of administrative resources unsupported by any administrative or judicial interest." Weinberger v. Salfi, supra, at 766.

a petition for reconsideration had been filed.[22] The court's reliance upon Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938), is misplaced. In that case, the appellant never even attempted to participate at the administrative level. There, the court noted specifically that the appellant, after having determined that its interests were affected by the Commission's decision, elected to go directly to the Court of Appeals rather than seek reconsideration by the Commission. Id. at 285.

In the present case, soon after the Initial Decision found SICC unqualified, HBS began preparations to file for the SICC channels when they became vacant. HBS recognized that its interests were threatened only when the settlement agreement was announced and it became apparent that the Commission would ignore the Jefferson Radio doctrine and permit an unlawful transfer of control. HBS immediately petitioned the Commission that the transfer was not permitted, filed, following the precedent of MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257 (D.C. Cir. 1968), applications for the channels which should have been vacated, and petitioned the commission to allow these filings. The Commission ruled on all of these issues. HBS' actions met both the test of Red River and of the later-

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[22] Spanish International Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967), was not an exhaustion case. In that case, the court upheld a Commission decision that SIBC had not acted diligently and which denied SIBC the relief requested. The court reviewed the Commission decision on the merits, and, in deciding that the Commission had acted reasonably, the court quoted extensively from Red River Broadcasting Co. v. FCC, 98 F.2d 282 (D.C. Cir. 1938). It did so, however, only to illustrate its view that the FCC acted properly (not to invoke the doctrine of exhaustion of administrative remedies), concluding: "We are unwilling to find abuse [by the FCC] in a failure to exercise a discretion that was never properly invoked." 385 F.2d at 628.

enacted Section 405. None the less, the court held that HBS had not exhausted its administrative remedies because its applications were "untimely."[23]

Case law concerning discretionary administrative exhaustion is wholly inconsonant with the court's new approach. The court rigidifies the doctrine, mandating dismissal for failure to take even the "earliest available" step. Pet. App. A, 9a; 931 F.2d at 77. The new scheme requires dismissal even if later corrective steps at the administrative level have provided the agency with the opportunity to evaluate and to rule on the questions presented to the court. In contrast, the traditional analysis of the doctrine has concentrated on "avoiding premature interruption of the administrative process." McKart v. U.S., 395 U.S. 185, 193 (1968). See N.Y. State Ophthalmological Soc. v. Bowen, 854 F.2d 1379, 1387 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); Atlantic Richfield Co v. U.S. Dept. of Energy, 769 F.2d 771, 781 (D.C. Cir. 1984); Athlone Indus., Inc. v. CPSC, 707 F.2d 1485, 1488 (D.C. Cir. 1983).

The court below ignores the basic principles behind the exhaustion doctrine and, instead, corrupts this important doctrine by injecting a mechanistic formality. HBS' participation satisfied all the purposes of the

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[23] The opinion engages in a tautological exercise to justify its result. It accepts as its premise the Commission's position that HBS' applications were "untimely" because they were not filed contemporaneously with SICC's applications. HBS argued below that under MG-TV the applications were timely notwithstanding the cut-off rules. The court denied review of the the Commission's failure to follow MG-TV because its applications were "not timely." Pet. App. A, p. 6a; 931 F.2d at 76.

exhaustion doctrine.[24] The essential elements of exhaustion are to prevent premature judicial action in pending administrative proceedings and to ensure that the administrative agency has had the opportunity to pass on the questions of law or fact upon which the party seeking review relies.[25]

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[24] This Court has rejected the mechanical application of the doctrine, stating that "[t]he ultimate decision of whether to waive exhaustion should...be guided by the policies underlying the exhaustion requirement." Bowen v. City of New York, 476 U.S. 467, 484 (1986). The policies mentioned in Bowen were preventing premature interference with agency processes, allowing the agency to correct its own errors, to compile a record, and to allow the agency to use its expertise. Id. Chief Judge Mikva's dissent observed:

> The majority's decision to deny judicial review will not prevent "premature" interference with FCC proceedings for the simple reason that the petitioners raised each argument presented to this court before the Commission, and the Commission conclusively rejected every one. . . . Applying the exhaustion doctrine to these facts stretches its underlying rationales beyond the breaking point.

Pet. App. A, p. 18a; 931 F.2d at 81.

[25] With the District of Columbia Circuit now being the sole exception, the concept and application of the doctrine to these two central purposes is consistent throughout the circuits. See Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 702 (6th Cir. 1985)(purpose is to permit an administrative agency to apply its special expertise in interpreting relevant statutes and in developing a factual record without premature judicial intervention); National Black Media Coalition v. FCC, 791 F.2d 1016, 1021-22 (2d Cir. 1986)(exhaustion not required where FCC has considered issue, even where raised by third party); Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981); Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 344-46 (3rd Cir. 1977); Mullins Coal Co. v. Clark, 759 F.2d 1142, 1145 (4th Cir. 1985); Rodrigues v. Donovan, 769 F.2d 1344, 1349 (9th Cir. 1985); Glover v. U.S., 286 F.2d 84 (8th Cir. 1961)(exhaustion not required where unnecessary to ensure that the agency has the opportunity to consider the arguments); Kennecott Copper Corp. v. EPA, 612 F.2d 1232 (10th Cir.

III.

The Decision Below Creates Unnecessary and Adverse Effects on the Administrative Process

The decision below poses a clear danger to an orderly administrative process. The decision is not grounded in the Communications Act, which would have bound the court to the language of Section 405 and limited the decision's applicability to one agency. Instead, the opinion relies implicitly on the general concept of the judicially created discretionary exhaustion requirement. It, therefore, has general applicability to all cases arising from all administrative decisions.

The court clearly sets forth the practical impact of the new exhaustion requirement:

> "[E]xhaustion of administrative remedies . . . means utilization of the earliest available corrective step," and where a litigant "'neglect[s] to avail itself of such an opportunity, it may thus have foreclosed itself from seeking further relief.'"

Pet. App. A, p. 9a; 931 F.2d at 77. In the context of the FCC, the court states that an applicant for a broadcast license must file a "timely application"[26] before appealing from an FCC order.

1979)(court heard claims of petitioner who had not participated at the agency level, but who advanced arguments that had been presented to the agency).

[26] The court accepted without question the Commission's definition of timeliness as filing a month prior to the date upon which the license term expires. See 47 C.F.R. 73.3516(e).

Despite the fact that HBS had no interest in competing against an incumbent licensee for any license, the new exhaustion rule would have required HBS to file a series of competing applications from 1980 to 1983, to participate actively in the renewal proceeding (or face dismissal for failure to prosecute), and to commit significant resources to a process it wanted no part of.[27]

It was only when the Initial Decision disqualified SICC that applications for the channels (soon to be vacant) became of interest to HBS. Indeed, HBS would likely have waited to file its applications until the channels were formally declared vacant, but for the sudden and unexpected unlawful approval by the Commission of the settlement and sale to Hallmark.

The new exhaustion requirement would place any litigant who relies on the agency to follow its own rules at risk. It means that HBS could not challenge the FCC's action which violated the policy upon which HBS relied unless HBS had, six years earlier, filed and prosecuted a protective application. Neither alternative result serves the public interest or the purposes of the exhaustion: either parties must endure long and expensive proceedings, burdening the administrative process with protective applications, or they must suffer the agency's ability to ignore its own statute and rules with impunity because no one may challenge its action in court.

While the majority opinion is written in the context

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[27] Challenges to incumbent licensees are rare because they nearly always are unsuccessful. Incumbents generally are favored in the renewal process and usually have greater financial resources to devote to a long legal process.

of an FCC proceeding, there is no basis for limiting its effect to that agency. Any failure by a party before any agency to take every possible step would subject that party to future dismissal of its request for judicial review, even where (as here) such failure is cured and the agency has addressed the issue.

No longer may a person wait until a clearly identified interest is affected by agency action. The person must enter every proceeding which might later affect his interest at its inception as a prophylactic measure and maintain an active participation through every level of the administrative process to ensure that he will not be denied judicial review. Such a danger is both unnecessary and unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(2)

91-130

Supreme Court, U.S.
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No. 91-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HISPANIC BROADCASTING SYSTEMS, INC.,
A DELAWARE CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 12, 1990 Decided April 23, 1991
As amended May 14, 1991

No. 87-1285

COALITION FOR THE PRESERVATION OF HISPANIC BROADCASTING, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

SPANISH INTERNATIONAL COMMUNICATIONS CORP.
STATION REPRESENTIVES ASSOCIATION, INC.
FOUCE AMUSEMENT ENTERPRISES, INC.
UNIVISION, INC.,
INTERVENORS

No. 87-1287

HISPANIC BROADCASTING SYSTEMS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

SPANISH INTERNATIONAL COMMUNICATIONS CORP.
BAHIA DE SAN FRANCISCO TELEVISION CO.
SEVEN HILLS TELEVISION CO.
STATION REPRESENTATIVES ASSOCIATION, INC.
FOUCE AMUSEMENT ENTERPRISES, INC.
UNIVISION, INC.
INTERVENORS

No. 87-1289

HISPANIC BROADCASTING LIMITED PARTNERSHIP,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

SPANISH INTERNATIONAL COMMUNICATIONS CORP.
BAHIA DE SAN FRANCISCO TELEVISION CO.
SEVEN HILLS TELEVISION CO.
STATION REPRESENTATIVES ASSOCIATION, INC.
UNIVISION, INC.
INTERVENORS

No. 88-1564

SUSAN M. JARAMILLO, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

SEVEN HILLS TELEVISION CO.
UNIVISION HOLDINGS, INC., ET AL.,
INTERVENORS

No. 88-1588

TVL CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

UNIVISION HOLDINGS, INC., et al., INTERVENOR

No. 88-1596

THE COALITION FOR THE PRESERVATION OF
HISPANIC BROADCASTING, et al., APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

UNIVISION HOLDINGS, INC., et al., INTERVENOR

Notices of Appeals from an Order of the
Federal Communications Commission

Morton L. Berfield, with whom *Lewis I. Cohen* and *Roy W. Boyce* were on the brief, for appellant Hispanic Broadcasting Limited Partnership in No. 87-1299.

Steven A. Sharp for appellant Hispanic Broadcasting System in No. 87-1287. *Martin E. Firestone* also entered an appearance for appellant.

Katrina Renouf, with whom *Margot Polivy* was on the brief, for appellant Susan Jaramillo in No. 88-1564.

Bruce A. Eisen was on the brief for appellant Coalition for the Preservation of Hispanic Broadcasting in Nos. 87-1285 and 88-1596.

James P. Riley and *Robert A. DePont* were on the brief for appellant TVL Corporation in No. 88-1588.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, with whom *Robert L. Pettit*, General Counsel and *Sue Ann Preskill*, Counsel, Federal Communications Commission were on the brief, for appellee in Nos. 87-1285, 87-1287, 87-1299, 88-1564, 88-1588 and 88-1596.

Linda K. Smith and *David H. Solomon* entered appearances for intervenor Station Representatives Association, Inc. in Nos. 87-1285, 87-1287 and 87-1299.

L. Andrew Tollin and *Leon T. Knauer* entered appearances for intervenor Seven Hills Television Co. in Nos. 87-1285, 87-1287, 87-1299, 88-1564 and 88-1588.

N. Frank Wiggins entered an appearance for intervenor Fouce Amusement Enterprises, Inc. in Nos. 87-1285, 87-1287 and 87-1299.

Richard E. Wiley, John C. Quale, James R. Bayes and *Diane Z. Goldman* entered appearances for intervenors Spanish International Communications and Univision

Holdings, Inc., et al. in Nos. 87-1285, 87-1287, 87-1299, 88-1588 and 88-1596.

John L. Tierney, Richard F. Swift and *Ann Bavender* entered appearances for intervenor Bahia de San Francisco Television Co. in No. 87-1287.

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, THOMAS, HENDERSON and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Dissenting Opinion filed by *Chief Judge* MIKVA.

WILLIAMS, *Circuit Judge*: This is an appeal from a Federal Communications Commission decision granting a conditional renewal of several television licenses. We deny the challenges of two petitioners for failure to exhaust administrative remedies and those of two others for want of standing.[1]

As the panel opinion presented the facts in detail, see *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349 (D.C. Cir. 1990), we provide only a summary. Spanish International Communications Corporation and Bahia de San Francisco (collectively "Spanish International") held six TV licenses, the first acquired by Spanish International's corporate predecessors in 1961. In January 1986 an administrative law judge found that Spanish International's relations with certain Mexican interests violated a Communications Act provision forbidding alien ownership of broadcasting stations. See 47 U.S.C. § 310(b). Facing a risk that this issue would doom its efforts to secure license renewal, Spanish International negotiated a settlement agreement under which, immediately upon renewal, it would sell the stations to Hallmark Cards, Inc. In October 1986 the Commission's Review

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[1]We also reject the claim of TVL Corporation for the reasons stated in the panel opinion, *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1355 (D.C. Cir. 1990).

Board approved this settlement and conditionally renewed Spanish International's licenses.

At about the time the Review Board acted, petitioners Hispanic Broadcasting Systems, Inc. ("HBS") and Hispanic Broadcasting Limited Partnership filed applications for the licenses and asked the Commission to reverse the Review Board. As the filings came years after the relevant FCC "windows" had closed, the Commission rejected the applications as untimely. Nonetheless, it permitted petitioners to appear before it as *amici* and considered their argument that the renewal and transfer of Spanish International's licenses violated the FCC's "*Jefferson Radio*" policy, which prohibits any licensee from transferring a broadcast station at full value while a proceeding that might lead to license forfeiture is pending. See *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). The Commission rejected this argument and affirmed the Review Board's approval of the transfer agreement and license renewal.

Two of the challengers are prospective applicants, HBS and the Partnership, and three, the Partnership (in a second capacity), Susan Jaramillo and the Coalition for the Preservation of Hispanic Broadcasting, are purportedly dissatisfied viewers. We hold that (1) HBS and the Partnership may not obtain judicial review because they did not timely invoke the administrative procedures required of prospective applicants; and (2) the viewers do not have standing to sue because they do not fall within the zone of interests contemplated by § 310(b).

The Would-Be Applicants

HBS and the Partnership seek two kinds of relief. First, they ask us to overturn the FCC's decision to reject their applications as untimely. We deny this relief for the reasons stated by the panel opinion. 893 F.2d at 1357-59. That resolved, we turn to whether such untimely applicants may now, in the hope of vacant channels and *new* filing opportunities, ask this court to overturn the FCC's approval of the renewal and transfer agreement.

Both panel opinions and, upon rehearing, the litigants themselves treated this issue as a matter of Article III standing: Are the prospects of these latecomers' winning the licenses (if they were vacant) serious enough that they were truly harmed by the Commission's rejection of claims that might have led to nonrenewal and vacancy? See generally *Warth v. Seldin*, 422 U.S. 490 (1975). Yet, partly because the applicant petitioners' untimeliness foreclosed a Commission assessment of their qualifications, the question cannot be answered without guesswork. As petitioners' tardiness also entailed a failure to exhaust administrative remedies, however, we can resolve the case on non-constitutional grounds. See *Coker v. Sullivan*, 902 F.2d 84, 88 (D.C. Cir. 1990) (dismissing case on non-constitutional jurisdictional grounds to avoid problematic Article III inquiry); *Moore v. United States House of Representatives*, 733 F.2d 946, 954 n.39 (D.C. Cir. 1984) ("[W]e should avoid deciding questions of a constitutional nature unless absolutely necessary to a decision of the case.") (internal quotes omitted). While the government did not specifically raise the exhaustion issue, the doctrine concerns economy not only of agency but also of judicial resources, see *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975), and accordingly this court may in its discretion raise the issue on its own. See, e.g., *Dettmann v. United States Dep't of Justice*, 802 F.2d 1472, 1476-77 & n.8 (D.C. Cir. 1986); *Power Plant Division, Brown & Root, Inc. v. OSHRC*, 673 F.2d 111 (5th Cir. 1982); *Brown v. Fauver*, 819 F.2d 395, 398-99 (3d Cir. 1987).

The judicial review provision of the Communications Act, 47 U.S.C. § 402(b), authorizes disappointed "applicant[s]" and, more generally, "any ... person who is aggrieved or whose interests are adversely affected" by a Commission licensing order to sue for relief in this court. Yet even "aggrieved" persons must comply with prescribed administrative procedures. See *Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967); *Red River Broadcasting Co. v. FCC*, 98 F.2d 282 (D.C. Cir. 1938); see also *Valley Telecasting Co. v. FCC*,

336 F.2d 914 (D.C. Cir. 1964); *Springfield Television Broadcasting Corp. v. FCC*, 328 F.2d 186 (D.C. Cir. 1964). Indeed, § 405 of the statute itself requires aggrieved persons who were not parties to the agency proceedings, as *one* prerequisite to judicial review, to petition the Commission for reconsideration of disputed orders.[2] In general, failure to exhaust administrative remedies bars judicial review of FCC orders.

Spanish International illustrates the exhaustion principle at work in the licensing context. International Panorama TV sought a license to construct a new television station. A competitor, Spanish International (apparently the same company as the beneficiary of today's ruling), twice submitted petitions attacking International Panorama's application, invoking the grounds it afterwards raised on appeal.[3] Because both petitions were untimely,

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[2]Although the applicant petitioners were not parties to the proceedings after denial of their untimely applications, their presentation to the Commission of the theories that they raise here, and the Commission's consideration of those theories, satisfies § 405 under the cases summarized at p. 12 below.

[3]Thus Spanish International met the condition that our cases sensibly impose for satisfying the exhaustion requirement of § 405: the Commission had a *fair opportunity* to address the issues raised on appeal. See *United Church of Christ v. FCC*, 911 F.2d 803, 809 (D.C. Cir. 1990) ("As we stated in *Meredith Corp. v. FCC* [809 F.2d 863, 870 (D.C. Cir. 1987)], '[a]s a condition precedent to judicial review, section 405 requires only that the Commission have a "fair opportunity" to pass on [an] issue.' "); see also cases cited at p. 12 below.

The dissent's suggestion that the Commission did not address Spanish International's claims on the merits, see Dissent at 4-5, is therefore irrelevant. It is also false. The court observed that "because of their public importance, [the Commission] treated extensively the questions raised by [Spanish International]. It found that all of the points lacked merit save its claim respecting [International Panorama's] character qualifications, and this issue it designated for hearing." 385 F.2d at 618. As the opinion suggests and the record and briefs confirm, the Commission later rejected Spanish International's efforts to resurrect the *same defeated attacks* on International Panorama's qualifications. See *id.* at 619; Appellate Record at 992-97, 1016-19, *Spanish Int'l Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967) (No. 20,326). These attacks formed Spanish International's merits argument on appeal.

the FCC refused to admit Spanish International as a party to the proceedings. After unsuccessfully petitioning for reconsideration under § 405, Spanish International asked this court (1) to reverse the FCC's order denying it formal participation in the application proceedings and (2) to reverse the FCC's decision that International Panorama satisfied the Commission's character qualifications. See Appellant's Brief, *Spanish Int'l Broadcasting Co. v.* FCC, 385 F.2d 615 (D.C. Cir. 1967) (No. 20,326).

The court affirmed the FCC's judgment that Spanish International's petitions were untimely and, accordingly, ruled that Spanish International had failed to exhaust the prescribed administrative remedies. 385 F.2d at 622-27. It then refused to consider Spanish International's substantive objections to the FCC's decision in favor of International Panorama. See *id.* at 627-28. "[E]xhaustion of administrative remedies," explained the court, "means utilization of the earliest available corrective step," and where a litigant " 'neglect[s] to avail itself of such an opportunity, it may thus have foreclosed itself from seeking further relief.' " *Id.* at 628, quoting *Red River*, 98 F.2d at 287-88.

As there, so here. An applicant for a broadcast license must file a timely application with the FCC before he may challenge an adverse Commission order in this court. This requirement promotes the values that the exhaustion doctrine was designed to protect: administrative and judicial economy and comity between courts and agencies. See generally *McKart v. United States*, 395 U.S. 185, 193-95 (1969). The exhaustion requirement protects the FCC's interest in the finality of its adjudication and, as in this case, of settlements arising under its jurisdiction. Requiring applicants for broadcast licenses to file on time also permits the Commission to take an advance reading of the various claims and order its business efficiently from the beginning.

Moreover, as Judge Mikva wrote for this court in *New York State Ophthalmological Society v. Bowen*, 854 F.2d

1379, 1387 (D.C. Cir. 1988), the exhaustion doctrine "promotes judicial efficiency . . . by making possible a disposition by the agency that will obviate the need for a judicial decision on [an] issue." See also *McKart*, 395 U.S. at 195; *Ticor Title Insurance Co. v. FTC*, 814 F.2d 731, 741 (D.C. Cir. 1987) (opinion of Edwards, J.). That principle is especially relevant here. If the applicant petitioners had filed timely applications, winning the licenses (their ultimate objective, assuming they would have spurned offers to join the settlement agreement) would have been only *conditionally* dependent on winning the legal dispute underlying this lawsuit (the alien ownership issue). They could have won the licenses without winning that dispute and, moreover, could have failed to qualify for those licenses without losing it. Either way, their timely participation at the administrative level could have mooted the issues fueling this litigation.

First, if HBS or the Partnership had timely pursued the proper administrative course, one of them might have prevailed in a comparative hearing and obtained the licenses without prevailing on the alien ownership issue (or, if even relevant under this scenario, the *Jefferson Radio* issue). Even if the FCC had ruled conclusively for Spanish International on the alien ownership issue, petitioners obviously could not have sued until after they had given their last administrative remedy — the comparative hearing — a shot, and we will not exempt them from that requirement now simply because they ignored the relevant application deadlines. And though it is difficult for a challenger to unseat an incumbent in a renewal proceeding, see generally *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 506-08 (D.C. Cir. 1982), "not even the probability of an administrative denial of relief will excuse the effort." See *Spanish International*, 385 F.2d at 626.[4]

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[4]The dissent proposes that parties be permitted to sit out agency proceedings until the prospects of administrative relief pass a certain threshold (never identified) of financial promise. Dissent at 5-8. The dissent understandably does not identify a sin-

Alternatively, if HBS and the Partnership had filed timely applications, the FCC might well have determined — quite apart from the issue of Spanish International's qualifications — that *they* were unqualified to operate broadcast stations. Indeed, the Commission pointed out in denying the belated applications that admitting petitioners to consideration "would require evidentiary hearings on [their] qualifications and on the standard comparative issue." See Joint Appendix 435; see also *In re Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978); *In re Edwin Berstein*, 4 FCC Rec. 8420, 8421 (Rev. Bd. 1989) (citing cases), *aff'd* 5 FCC Rec. 2843 (FCC 1990), *aff'd mem. sub nom. Lefebvre v. FCC*, No. 90-1284 (D.C. Cir. March 8, 1991). Whether an adverse decision on their basic qualifications would have stripped HBS and the Partnership of standing to appeal a renewal of Spanish International's license is an open question, turning in part on the seriousness and curability of the shortcomings in their applications. Compare *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 670-73 (D.C. Cir. 1987), with *Simmons v. FCC*, 145 F.2d 578, 579 (D.C. Cir. 1944). Even if such a determination had left their formal legal standing intact, it would have created a record exposing the weaknesses of their applications (thus filling the information vacuum that here prevents a firmly grounded finding of an Article III injury), and might have discouraged them from bringing their attack on Spanish International to court at all. The exhaustion doctrine thus permits us to avoid second-guessing agency decisions at the behest of litigants who have never been in a position to benefit from the decision they seek from us.

This is unlike the frequent case where compliance with

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gle case that supports such an extension of the exhaustion doctrine's futility exception. Apparently no court has yet felt it necessary to dilute the doctrine to that extent, presumably because no court shares the dissent's fear that the doctrine's application will generate "frivolous" administrative claims. See *id.* at 8.

an agency's procedures would not have caused the agency to venture down a path that could have mooted the issue brought to court. In such cases this court has often relaxed exhaustion requirements to permit consideration of issues that an agency has had a "fair opportunity" to address. See, e.g., *United Church of Christ v. FCC*, 911 F.2d 803, 808-09 (D.C. Cir. 1990); *United Church of Christ v. FCC*, 779 F.2d 702, 706-07 (D.C. Cir. 1985); *Meredith Corp. v. FCC*, 809 F.2d 863, 870 (D.C. Cir. 1987); *Marsh v. FCC*, 436 F.2d 132, 136 (D.C. Cir. 1970); *Gerico Investment Co. v. FCC*, 240 F.2d 410, 411-12 (D.C. Cir. 1957); see also *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680-82 & n.10 (D.C. Cir. 1983); *NRDC v. EPA*, 824 F.2d 1146, 1150-51 (D.C. Cir. 1987) (en banc). That approach makes sense. In such cases, there is little reason to think that a party's more thorough participation would have changed the agency's mind on those issues or otherwise precluded a lawsuit.[5] The unsurprising upshot of our decision here is simply that one who seeks to overturn a Commission licensing decision in the capacity of a disappointed applicant must actually apply, and must do so in timely fashion.

Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75, 79-80 (D.C. Cir. 1965), and *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1265-66 (D.C. Cir. 1968), insofar as they discussed exhaustion issues at all, did not explicitly address the precise problem at issue here. To the limited

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[5]Contrary to the dissent's suggestion, see Dissent at 4, nothing we say undermines those of the above cases decided under 47 U.S.C. § 405. In such cases, requiring exhaustion is often pointless; in ours, it is not. An agency's prior opportunity to consider the issues on appeal may be a *necessary* condition for judicial review, but it is not therefore a sufficient condition. Dicta that § 405 "codif[ies]" the exhaustion doctrine, see Dissent at 4, can hardly wipe out *Spanish International*'s controlling treatment of the issue, which, to our knowledge, no case has ever criticized, much less purported to overrule. This leaves the dissent's criticism that *Spanish International* is "over a generation old", Dissent at 2, a curious ground for overruling a case.

extent that the principles underlying either opinion conflict with our holding here, they are overruled.

Obviously nothing in our decision prevents any person who feels aggrieved from appealing an order denying him party status in the administrative proceedings; the panel decision (incorporated here) disposing of the untimely applications exemplifies the point. And if the agency's denial were in error, its denial of status would necessarily excuse later non-participation.[6]

One final note: HBS and the Partnership cannot excuse their tardiness on the grounds that they did not exist until after the prescribed filing period. Their principals existed and could have formed the firms earlier.

The Viewers

Susan Jaramillo and the Coalition claim standing as viewers to challenge the FCC's approval of the renewal and transfer agreement. The Partnership also asserts viewer standing on the basis of the residence and viewing habits of its general partner. We dismiss these claims on prudential standing grounds. See generally *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 111 S. Ct. 913 (1991); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). Though viewers and listeners are among the intended beneficiaries of many Communications Act provisions, they are not the intended beneficiaries of § 310(b), see *Air Courier Conference of America*, nor are they otherwise "suitable challengers" to enforce it, see *Clarke*, 479 U.S. at 399; *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922-24 (D.C. Cir. 1989).

That section was designed to protect the entire nation — to "prevent[ ] alien activities against the Government

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[6]Cf. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 905 (D.C. Cir. 1989) (Silberman, J.) (exhaustion not raised; applicant sought license but was rebuffed by the Commission), *rev'd on other grounds sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

during the time of war." *Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir. 1958) (quoting 68 Cong. Rec. 3037 (1927) (remarks of Sen. Wheeler)). Committee hearings on the matter focused largely on keeping the airwaves available for military use in time of war, see Hearings on S.2910 Before the Senate Committee on Interstate Commerce, 73d Cong. 2d Sess. 165-72 (March 15, 1934); see also S. Rep. No. 781, 73d Cong. 2d Sess. 7 (1934), and only secondarily on the hazards of alien propaganda. Moreover, even if propaganda were a main concern, viewers seem an odd group to lead the enforcement, as genuine victims would by definition fail to notice the insidious effects. The viewers can only be suing as guardians of the national interest, but "[s]uch a generalized interest . . . is too abstract to constitute a 'case or controversy' appropriate for judicial resolution." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

Nor can viewers assert standing as intended beneficiaries of the *Jefferson Radio* doctrine, for it is entirely instrumental, aimed (in this context) only at enhancing the deterrent effect of whatever substantive provision supports the attack on the incumbent licensee, here § 310(b)(3). See *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981). Because petitioners cannot sue to enforce § 310(b), they cannot sue to enforce a means of enforcing § 310(b).

* * *

We affirm the FCC order of June 5, 1987. We adhere to the panel opinion as it relates to petitioner TVL's claim and to the FCC's decision to reject petitioners' applications as untimely. We vacate the panel opinion as it relates to the standing of petitioners HBS and the Partnership and to the merits of their *Jefferson Radio* claim, and dismiss for want of exhaustion the claims that each rests on its status as a frustrated applicant. Finally, we dismiss for want of standing the claims of petitioners Colaition for Hispanic Broadcasting and Susan Jaramillo and the in-

dependent claim of the Partnership in its role of viewer.

So ordered.

MIKVA, *Chief Judge*, dissenting: Running headlong from the questions briefed and argued before us, my colleagues seek refuge in a theory as novel as it is questionable. Unsupported by precedent, undeveloped by the court, and unresponsive to the facts of this case, the stepchild of exhaustion theory announced today has an inauspicious birth. I doubt that this poor relation will thrive; therefore, I take issue with the majority primarily because particular parties have wrongly been denied their day in court. But recognizing the possibility that today's holding may be vivified by other judges on another day, I also write to express my view that it finds no precedent in the wholly sensible doctrine of administrative exhaustion and is, in fact, at odds with the goals underlying that requirement. Accordingly, I dissent.

I.

We granted en banc review in this case to consider a single question: Whether petitioners have standing to challenge decisions by the Federal Communications Commission (the "FCC" or "Commission") allowing assignment of certain television station licenses to Hallmark Cards, Inc. ("Hallmark"). A technical and fact-specific issue to be sure, but one that this court deemed at the time to be of "exceptional importance." FED. R. APP. P. 35(a). *See* Appellee's Petition for Rehearing or Suggestion for Rehearing En Banc at 2 (filed Feb. 23, 1990) (seeking review of standing issue on grounds of importance).

Having heard the Commission's position on the standing issues of this case, I sympathize with the court's impulse to rest its holding on other grounds. Standing to appeal administrative decisions depends on a complex mix of statutory and constitutional conundrums, and is not simple to explicate. If, therefore, petitioners' claims had been totally meritless, this court might well have dismissed them without reaching the relatively difficult standing questions. *See Coker v. Sullivan*, 902 F.2d 84, 88 (D.C. Cir. 1990); *Adams v. Vance*, 570 F.2d 950, 954 n.7

(D.C. Cir. 1978); *Chinese Am. Civic Council v. Attorney Gen.*, 566 F.2d 321, 325 (D.C. Cir. 1977). But I can see no justification for the majority's resort to grounds so unlikely that no party ever thought to brief or argue them, and so arcane that the court can find just one inapposite case (over a generation old) to cite as direct precedent. *See* Majority Opinion at 8-9 [hereinafter "Maj. Op."] (discussing *Spanish Int'l Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967)).

If it is dissatisfied with the parties' presentations to this court, the majority could—and should—have ordered supplemental briefing so that its judgment would be an informed one. If it is merely intent on avoiding the standing question upon which rehearing en banc was granted, the majority would have been well advised to dismiss this en banc petition as improvidently granted. But the majority chooses a different course, to which I now turn.

II.

The court suggests that its approach will protect the finality of FCC proceedings and "promot[e] judicial efficiency," thereby furthering purposes traditionally associated with the exhaustion doctrine. Maj. Op. at 9-10. But these reasons can be invoked to justify *any* refusal to review agency action; whenever courts find challenges to administrative decisions nonjusticiable, they enhance the finality of agency determinations and lighten the judiciary's load. Accordingly, the court should adhere to its practice of asking whether dismissal of a case on exhaustion grounds would further "the primary purpose of the exhaustion doctrine": preventing premature interruption of the administrative process. *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 104 (D.C. Cir. 1986). *See Atlantic Richfield Co. v. Department of Energy*, 769 F.2d 771, 781 (D.C. Cir. 1984) (noting that avoidance of premature interruption is the "primary objective of the exhaustion doctrine," and stating that "[w]here ... the goals of this requirement cannot possibly be achieved,

there obviously is no need for exhaustion"); *Athlone Industries, Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1488 (D.C. Cir. 1983) ("The exhaustion doctrine was designed primarily to prevent premature interruption of the administrative process."); *see also Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975) ("[W]hen the reasons supporting the [exhaustion] doctrine are found inapplicable, the doctrine should not be blindly applied.").

The majority's decision to deny judicial review will not prevent "premature" interference with FCC proceedings for the simple reason that the petitioners raised each argument presented to this court before the Commission, and the Commission conclusively rejected every one. *See Spanish Int'l Communications Corp.*, 2 FCC Rcd 3336 (1987) (rejecting competing applications and approving settlement agreement); *Spanish Int'l Communications Corp.*, 2 FCC Rcd 3962 (Mass Media Bureau 1987) (approving assignment of television licenses), *aff'd*, 3 FCC Rcd 4319 (1988). This court has before it final administrative decisions, based on a record developed to the agency's satisfaction, and reflecting the Commission's unhampered exercise of discretion and application of expertise. *See McKart v. United States*, 395 U.S. 185, 194 (1969). Applying the exhaustion doctrine to these facts stretches its underlying rationales beyond the breaking point.

My conviction that no prudential exhaustion doctrine bars assertion of jurisdiction over this petition for review finds unequivocal support in our cases interpreting the only exhaustion requirement that Congress saw fit to impose in the Communications Act. *See* 47 U.S.C. § 405 (1988). Section 405 bars judicial review of Commission actions where:

> the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

Id. The majority concedes that section 405, as construed in our cases, does not bar review of petitioners' claims. *See* Maj. Op. at 8 n.2. Yet it fails to mention that this court has repeatedly held that section 405 "codif[ies] the judicially-created doctrine of exhaustion of administrative remedies." *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983)). *See Office of Communication of United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990); *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990); *Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 513 n.7 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 706 (D.C. Cir. 1985). Unless it is prepared to overrule this long line of authority, I am baffled how the majority can dismiss this case for failure to exhaust administrative remedies. If section 405 does not bar review, then the prudential exhaustion requirements that are incorporated within section 405 *cannot* provide a basis for dismissal of petitioners' claims.

Spanish Int'l Broadcasting Co. v. FCC, the 1967 decision so heavily relied upon by the majority, is not to the contrary. In that case, the Commission had summarily rejected petitions for administrative review and rehearing without addressing the merits of appellant's objections. *See* 385 F.2d at 619. (While the FCC did address the merits of administrative petitions submitted by Spanish International Broadcasting Company during 1964, it summarily rejected the appellant's relevant petitions, which challenged FCC decisions issued in November 1965 and March 1966. *Spanish International* makes no suggestion that the arguments presented in these distinct petitions overlapped. *See* 385 F.2d at 618-19.) Our cases interpreting section 405 establish that invocation of the exhaustion doctrine is warranted under circumstances like those in *Spanish International*, where the arguments of a non-party were not considered by the Commission. *See*

United Church of Christ, 779 F.2d at 706-07; *Washington Ass'n for Television & Children*, 712 F.2d at 682. In this case, though, the Commission addressed petitioners' arguments in the challenged decisions, making application of the exhaustion doctrine inappropriate. *Cf. United Church of Christ*, 911 F.2d at 809 ("Because the Commission 'in fact considered the issue,' UCC's challenge . . . may therefore be reviewed." (citation omitted)).

It is of course true that this case might never have come to court if the petitioners had acted differently years ago, long before the legal questions presented by this appeal arose. *See* Maj. Op. at 10-11. But I cannot agree with the majority that wishful speculation about what might have been justifies denying access to this court. Nor does the exhaustion requirement's futility exception, invoked by the majority, have any relevance to this case, *see* Maj. Op. at 10 & n.4; because the exhaustion doctrine cannot reasonably be applied to the facts before us, reliance on cases interpreting one of its exceptions is insufficient to justify the majority's holding.

I find the court's approach particularly disquieting because Hispanic Broadcasting Limited Partnership ("HBLP") and Hispanic Broadcasting Systems, Inc. ("HBS") acted just as wise investors would—they spent time and money actively pursuing the licenses only at the point when a realistic chance of obtaining them arose. That a court sensitive to economic theory in other contexts should confuse rational economic behavior with a lack of genuine interest in obtaining the licenses only points up the majority's fervor to be done with this case. *Cf. Tennessee Gas Pipeline Co. v. FERC*, No. 89-1785, slip op. at 8-10 (D.C. Cir. March 5, 1991) (discussing "Efficient Market Hypothesis"); *United States v. Western Elec. Co.*, 900 F.2d 283, 297-98 (D.C. Cir.) (per curiam) (noting judicial and academic views on interrelationship of antitrust laws and market behavior), *cert. denied*, 111 S. Ct. 283 (1990).

It is critical to remember that the television licenses which HBLP and HBS seek *were not vacant* during the

years when, in the majority's view, HBLP and HBS should have pursued them. Rather, they were held by Spanish International Communications Corporation and Bahia de San Francisco (collectively, "Spanish International"), which were entitled under FCC rules to an all-but-insurmountable "renewal expectancy." *See Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982) (approving renewal expectancy policy), *cert. denied*, 460 U.S. 1084 (1983). The majority admits (with some understatement) that it is "difficult" to unseat an incumbent license-holder, Maj. Op. at 10, while the FCC stated during oral argument that its policy is "not to encourage" the filing of competing applications for licenses held by qualified licensees.

The prospects for those seeking Spanish International's licenses improved dramatically when the Commission, finding a "substantial question" whether Spanish International was under alien control, ordered that a hearing be held on the incumbent's qualifications as a license-holder. *See Hearing Designation Order*, 48 Fed. Reg. 28549 (1983). But the majority fails to mention that a long-standing Commission practice known as the "*Jefferson Radio* policy," as then in force, precluded transfer of Spanish International's licenses pending resolution of the qualifications issue. *See Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981). Under *Jefferson Radio*, the very event that gave prospective applicants real hope of obtaining Spanish International's licenses—designation of a qualifications hearing—prevented HBLP and HBS from competing for those licenses. Their only option was to wait: If the Commission determined that Spanish International was qualified, it would again be foolish to challenge that incumbency; if unqualified, Spanish International would lose the licenses and HBS and HBLP could then compete on an equal footing with other applicants.

These reasonable expectations were upset, however, by an unforeseeable change in the well-established *Jefferson Radio* policy. The Commission decided to ratify the settle-

ment agreement under which Spanish International would transfer its licenses to Hallmark, notwithstanding *Jefferson Radio*. *See Spanish Int'l Communications Corp.*, 2 FCC Rcd 3962. In my view, approval of the settlement agreement and related license assignment constituted an impermissible departure from the *Jefferson Radio* policy. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1359-62 (D.C. Cir. 1990) (per Mikva, J.). For present purposes, though, this court need only recognize that HBLP and HBS, relying on prior statements of that policy, had no reason to anticipate Commission approval of a license transfer during the pendency of proceedings on the qualifications issue. Surprised in this way, HBLP and HBS did the only thing they could, opposing the settlement at all levels while filing applications for the disputed licenses. *See* Petition of HBS to Deny Applications for Transfer of Control, filed Sept. 26, 1986, *reproduced in* Joint Appendix at 150 [hereinafter "J.A."], *denied, Spanish Int'l Communications Corp.*, Mass Media Bureau No. 3713 (released June 23, 1987), *reproduced in* J.A. at 443; Petition of HBS for Acceptance of Applications, filed Sept. 26, 1986, *denied*, 2 FCC Rcd 3336; Petition of HBLP [then, Hispanic Broadcasting, Ltd.] for Reconsideration, filed Nov. 10, 1986, *reproduced in* J.A. at 345, *dismissed, Spanish Int'l Communications Corp.*, 1 FCC Rcd 844 (Review Bd. 1986); Petition of HBLP to Intervene or in the Alternative for a Waiver of the Rules, filed Nov. 10, 1986, *reproduced in* J.A. at 372, *dismissed*, 1 FCC Rcd 844, *dismissed as moot*, 2 FCC Rcd 3336; Petition of HBLP for Acceptance of Applications, filed Dec. 9, 1986, *reproduced in* J.A. at 405, *denied*, 2 FCC Rcd 3336; Application of HBLP for Review, filed Dec. 29, 1986, *reproduced in* J.A. at 505, *denied*, 3 FCC Rcd 4319.

Petitioners have no way of curing the shortcomings that the majority sees in their past efforts; that is just another aspect of the unfairness visited specifically upon them. More generally, though, the majority does not indicate what those who would challenge FCC licensing decisions must do to satisfy its retroactive "exhaustion"

requirement. Must they seek every license up for renewal on the off chance that the incumbent licensee will be found unqualified, and that the license will be economically attractive at that hypothetical time? What are the implications of such a result for the Commission's established renewal procedures? Must prospective license-holders have applied for the license in question during the most recent filing window, or is any past filing sufficient? Must the FCC have recognized them as qualified to hold a broadcast license? How can they show their qualifications absent a comparative licensing proceeding? One can only speculate. It is clear, though, that the majority effectively requires parties with an interest in competing for vacant licenses to safeguard that interest by filing frivolous applications challenging incumbent license-holders.

If the majority thinks such waste of applicants' resources a trade-off for heightened administrative efficiency, it is misguided; today's decision may well increase the number of applications filed for licenses held by qualified incumbents, even though such applications are disfavored by the Commission and will have no real chance of success. Thus, invocation of exhaustion principles here will hinder the very administrative efficiency those principles were designed to advance. I doubt that this result is intended by the majority, but I am not surprised that nonsensical results will flow from a decision driven more by evasion than logic.

If, on the other hand, the court is motivated by a naked instinct to keep those who would challenge agency decisions out of court, my objection is more elemental. The record is clear that these petitioners acted reasonably in light of administrative precedents and the decisions of this court. Punishing sensible economic and legal decisions by withholding judicial review from firms that make them is, in my view, an unacceptable exercise of judicial discretion.

III.

I do not overlook the majority's effort to narrow its opinion to the context of this case. *See* Maj. Op. at 12.

But I cannot join with my colleagues on that basis alone. Rather, I believe today's decision unwise, unsound, and unfair. I dissent.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 11, 1989 Decided January 12, 1990

Nos. 87-1285, *et al.*

COALITION FOR THE PRESERVATION OF HISPANIC BROADCASTING, *ET AL.*, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT

UNIVISION HOLDINGS, INC., *ET AL.*, INTERVENORS

Petition for Review of Orders of the Federal Communications Commission

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Martin E. Firestone, for Hispanic Broadcasting Systems, Inc., with whom *Bruce A. Eisen*, for Coalition for the Preservation of Hispanic Broadcasting, and *Richard S. Rodin*, for Susan M. Jaramillo, were on the joint brief for petitioners in Nos. 87-1285, 87-1287, 88-1564, and 88-1596.

Morton L. Berfield, with whom *Lewis I. Cohen* and *Ray W. Boyce* were on the brief for petitioner, Hispanic Broadcasting Limited Partnership, in No. 87-1299.

James P. Riley, with whom *Robert A. DePont* was on the brief for petitioner, TVL Corporation, in No. 88-1588.

Sue Ann Preskill, Counsel for the FCC, with whom *Diane S. Killory,* General Counsel, *Daniel M. Armstrong,* Associate General Counsel, and *S. Lee Martin,* Counsel, FCC, were on the brief for respondent in all cases.

Richard E. Wiley, with whom *John C. Quale* and *Diane Z. Goldman* were on the brief for intervenors, Univision Holdings, Inc., et al., in Nos. 87-1285, 87-1287, 87-1299, 88-1564, 88-1588, and 88-1596. *James R. Bayles* also entered an appearance for Univision Holdings, Inc., et al.

Linda K. Smith and *David H. Solomon* entered appearances for intervenor, Station Representatives Association, Inc. in Nos. 87-1285, 87-1287, 87-1299.

L. Andrew Tollin and *Leon T. Knauer* entered appearances for intervenor, Seven Hills Television Company, in Nos. 87-1285, 87-1287, 87-1299, and 88-1564.

N. Frank Wiggins entered an appearance for intervenor, Fouce Amusement Enterprise, Inc., in Nos. 87-1285, 87-1287, 87-1299.

John L. Tierney, Richard F. Swift and *Ann Bavender* entered appearances for intervenor, Bahia de San Francisco Television Co., in Nos. 87-1287 and 87-1299.

Before: MIKVA, EDWARDS and WILLIAMS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MIKVA.

Opinion filed by *Circuit Judge* WILLIAMS, dissenting in part and concurring in part of the judgment.

MIKVA, *Circuit Judge*: In these consolidated cases, three companies comprised of Hispanic investors, an association claiming concern with preserving Hispanic broadcasting, and an Hispanic individual petition this court for judicial review of two orders of the Federal Communications Com-

mission ("FCC" or "Commission"). The first order approved a settlement agreement providing for the grant of license renewal applications for Spanish International Communications Corporation ("SICC") and Bahia De San Francisco ("Bahia") subject to the prompt transfer of the licenses to a holding company controlled by Hallmark Cards Inc. ("Hallmark"). The first order also denied petitions for acceptance of competing applications for the SICC and Bahia stations by two of the companies bringing petitions in this case. *See Spanish International Communications Corporation*, 2 FCC Rcd. 3336 (1987). The second order granted applications to transfer control of the licenses to Hallmark and denied applications which sought to block the transfer. *See Spanish International Communications Corporation*, 3 FCC Rcd 4319 (1988).

The settlement agreement was approved after an ALJ determined that the stations in question were subject to the *de facto* control of an alien in violation of §310(b)(3) of the Communications Act of 1934, 47 U.S.C. § 310(b)(3) (1982). The principal question presented is whether the Commission's approval of a full market value sale to Hallmark prior to the final resolution of the renewal proceedings contravenes the Commission's policy forbidding assignment at full value of broadcast stations by a licensee, whose qualifications are under investigation, until the Commission has determined that the licensee has not forfeited its broadcast authorization. *See Jefferson Radio Company v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964). If indeed the Commission has changed its *Jefferson Radio* policy, we must determine whether it has explained adequately its departure from existing policy. We affirm the Commission's rulings declining to accept the competing applications and declining to review the actions of another federal court in administering a bidding process that led to the selection of Hallmark as the transferee. However, we hold: (1) that the three companies, as prospective competitors for the licenses, have standing to challenge the Commission's approval of the settlement and transfer; and (2) that the Commission departed from the policy

upheld in *Jefferson Radio*. Because this case does not fall within any of the established exceptions to *Jefferson Radio*, we remand this case to the Commission to complete the renewal proceedings that were pending at the time the transfer was approved or to enunciate and explain a new policy that would modify *Jefferson Radio*.

I

A. *Statutory Background*

Section 310(b) of the Communications Act precludes the Commission from granting a broadcast license to foreign nationals or their representatives or to foreign corporations. 47 U.S.C. §310(b)(1), (2). In addition, under the provision at issue in this case, "[n]o broadcast . . . license shall be granted to or held by [a United States corporation] of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned . . . or voted by aliens or their representatives." 47 U.S.C. §310(b)(3). Congress' motivation in passing this restriction was based primarily " 'upon the idea of preventing alien activities against the Government during the time of war.' " *Noe v. FCC*, 260 F.2d 739, 741 (D.C. Cir.), *cert. denied*, 395 U.S. 924 (1959) (quoting 68 Cong. Rec. 3037 (1927)).

B. *Procedural History*

1. *Proceeding before the ALJ*

SICC and Bahia (collectively, "SICC") were the licensees of six television stations broadcasting in the Spanish language. A seventh Spanish language station was licensed to the Seven Hills Television Company, which was controlled by many but not all of the principals who controlled SICC. SICC's corporate predecessors began acquiring broadcast stations in 1961. Prior to initiating in 1983 the renewal hearing at issue in this case, the Commission, with knowledge of the relationships giving rise to the hearing, unconditionally granted various applications by SICC to acquire stations and repeatedly renewed

SICC's broadcast licenses. After a staff investigation precipitated by an outside complaint, the Commission designated for hearing the renewal applications for each SICC station. The principal issue was whether the corporate licensees of the stations were controlled by aliens or their representatives in violation of Section 310(b) of the Act. After a full evidentiary hearing, the ALJ found that SICC had violated §310(b)(3) because Reynald V. Anselmo, President and a director of SICC, had acted as the representative of the Azcarraga family, Mexican citizens and owners of a Mexican media empire. *Spanish International Communications Corporation,* FCC 86D-1, *Initial Decision* at ¶ 176 (January 8, 1986). While the Azcarragas' stock holdings in SICC did not exceed the 20% statutory limitation, the ALJ concluded that the family's financial and personal relationships with American principals of SICC, particularly Anselmo, gave the family a degree of influence and control over the SICC stations which "greatly exceeded that permitted by Section 310(b)."

According to the ALJ this influence manifested itself at several levels. The composition and ownership of the board of directors of licensee corporations were affected by the Azcarragas' financing of stock purchases for selected principals. For example, Anselmo, a former employee in the Azcarragas' media empire, purchased interests in SICC stations with Azcarraga financing. As president and a director of all of the licensee companies, Anselmo personally selected all station managers. In addition, a major portion of programs broadcast by SICC stations originated from Televisa, a Mexican production company in which the Azcarragas had a controlling interest. The ALJ regarded Anselmo as the chief conduit of the Azcarragas' influence and as a "representative of aliens" within §310(b)(3). These facts, coupled with the "historic financial and personal ties between Licensees and the Azcarraga family," resulted in "an abnormal relationship . . . whereby the [SICC] stations were dependent on foreign subsidiaries" for financing, programming and management. Thus the ALJ denied the renewal applica-

tions. He invited the parties, however, to seek "a less drastic remedial solution, such as a corporate restructuring" by raising the matter in an application for review of his decision.

2. *The Settlement Agreement*

The licensees appealed the ALJ's decision to the Commission's Review Board and several third parties filed exceptions to the ALJ decision. The exceptions challenged: (1) the ALJ's refusal to consider whether SICC abused the Commission's processes by filing lawsuits against Spanish Radio Broadcasters of America ("SRBA") (one of the excepting parties) and other potential witnesses in the proceeding against SICC; and (2) the ALJ's refusal to consider whether there was misconduct or misrepresentation sufficient to violate the Commission's policy on character qualifications.

While the exceptions were pending before the Board, SICC submitted a proposed settlement agreement whereby the SICC licenses would be renewed for the limited purpose of promptly transferring the stations to an unrelated, qualified buyer. SICC proposed to sell the stations to Hallmark, an American corporation having no ties to the Azcarragas. The selection of Hallmark arose from the settlement of an unrelated, ongoing stockholders' derivative suit brought against SICC, *Fouce Amusement Enterprises, Inc. v. Spanish International Communications Corp.*, No. CV 76-3451-MRP (C.D. Cal.). After SICC agreed to settle the stockholders' suit by selling the stations, the federal district court for the Central District of California supervised bidding for the stations and ultimately accepted Hallmark's bid.

The Commission's Review Board approved the proposed settlement without ruling on the merits of the exceptions. On review, the Commission agreed with the Review Board that the proposed assignment of SICC licenses was in the public interest notwithstanding its general policy under *Jefferson Radio*. The Commission reasoned that under the circumstances of the case, the

proposed sale would "not unacceptably diminish" the deterrence of licensee wrongdoing—the rationale undergirding *Jefferson Radio. Spanish International Communications Corporation,* 2 FCC Rcd. 3336, 3338-39 (1987). The Commission deemed the settlement in the public interest because: (1) the "technical" nature of the violations found by the ALJ suggested that SICC had no intention of violating the statute or deceiving the Commission; and (2) by providing for the removal of SICC as licensees, the settlement constituted an effective means to implement prospectively the statutory policy against alien control. Noting that SICC and its predecessor had been allowed to broadcast for the past twenty-five years and citing the "unique contributions" that these stations made to broadcasting in this period, the Commission concluded that this was an appropriate case in which SICC should be removed from broadcasting, but without the harshness attending an outright denial of its renewal applications. The Commission also found that the settlement agreement served the public interest by simplifying a complex case, saving administrative costs, removing a "cloud" of uncertainty that can adversely affect a station's performance, and facilitating the resolution of the *Fouce* stockholder's derivative suit and the antitrust litigation directed at SRBA. Prior to this decision, SRBA withdrew its exceptions to the ALJ decision and filed a petition in support of the SICC settlement agreement, noting that SRBA and SICC were "executing an agreement that is intended to result in settlement as among themselves of the Antitrust Litigation." At no stage of these proceedings did the Commission rule on the merits of the exceptions.

Subsequently, the FCC considered Hallmark's qualifications and approved the applications to transfer the stations to Hallmark.

3. *Challenges Below by Petitioners*

The Hispanic Broadcasting Limited Partnership ("HBLP") filed a petition for review of the Review Board's approval of the settlement agreement along with

an application for acceptance of its competing license applications. The Commission denied both requests. Regarding the competing applications, the Commission concluded that because HBLP failed to file in accordance with Commission time limits the applications properly were rejected. The Commission declined to waive its cut-off rule "absent a compelling justification" which it did not find.

Hispanic Broadcasting Systems, Inc. ("HBS") also petitioned below for acceptance of competing applications. Although the Commission denied this petition, HBS does not challenge that ruling before this court. The Coalition for the Preservation of Hispanic Broadcasting ("the Coalition"), HBS, and Susan M. Jaramillo submitted a consolidated petition for review in this case. Each party petitioned below for denial of the application to transfer SICC stations to Hallmark. These petitions also were denied.

TVL Corporation, comprised of Hispanic investors and one of the two finalists in the shareholder derivative settlement process, petitioned the Review Board to deny applications to transfer SICC's licenses to Hallmark. In its petition TVL argued that the transfers should be denied without prejudice and that an order should be issued by the Commission directing SICC to request the Ninth Circuit, which had jurisdiction over the SICC stockholders derivative suit, to remand that litigation with instructions: (1) to vacate its selection of Hallmark as the prevailing bidder; and (2) to consider the final bids of Hallmark and TVL as of July 23, 1986.

TVL argued that the bidding process discriminated against minority-controlled entities seeking to purchase SICC. By requiring bidders to sign a confidentiality agreement precluding signers from seeking to acquire SICC by means other than the market value bidding process, TVL asserts that minority parties contemplating a "distress sale" were discriminated against. Pursuant to the *Jefferson Radio* policy of prohibiting a licensee facing

qualification issues in a renewal hearing from profiting on the sale of broadcast interests, TVL believed it was highly unlikely that a full market sale would be allowed. When TVL learned that the Commission's Mass Media Bureau had acceded to the "full value" sale, TVL quickly gathered the financing for a full value bid, timely filed its bid, and was selected as a second round bidder. On July 18, 1986 the TVL and Hallmark bids were submitted to the district court as the two finalists. Evidence of the final TVL financing commitments was not yet available when the bids were placed before the court, although TVL had advised SICC that it would be available as it ultimately was on July 23, 1986. The court entered an order conditionally approving the Hallmark bid on July 18, 1986. TVL then filed a motion to intervene in the shareholder suit and Hallmark moved for an affirmance of the order entered on July 18. The district court rejected TVL's motion to intervene and approved Hallmark on several grounds, one of which was that Hallmark had unequivocal financial backing. The Ninth Circuit affirmed the denial of the motion to intervene without comment on the merits of TVL's claims. *Fouce Amusement Enterprises, Inc. v. Spanish International Communications Corp.*, 819 F.2d 1145 (9th Cir.) (table), *cert. denied sub nom. TVL Corp. v. Spanish International Communications Corp.*, 108 S. Ct. 754 (1988).

TVL argued that the settlement agreement between SICC and the Bureau lacked appropriate measures to protect adequately potential minority purchasers who had previously been pursuing the possibility of a "distress sale" acquisition. The Commission rejected this claim, reasoning, *inter alia*, that the relief requested would be "entirely inappropriate and at variance with the Commission's long-standing policy of declining to adjudicate matters properly pending in another forum." *Spanish International Communications Corporation*, 3 FCC Rcd 4319, 4320 (1988).

II

A. *Standing*

The Commission concedes that petitioner HBLP has standing to challenge the Commission's dismissal of its competing applications. The Commission argues, however, that if this court upholds the dismissal of the competing applications, then HBLP does not have standing to challenge the settlement agreement or the transfer of SICC stations to Hallmark. In addition, the Commission argues that all other petitioners lack standing to bring their respective claims. We find that the three companies have standing; therefore we need not resolve the question of whether the Coalition or Ms. Jaramillo can claim standing as viewers.

The law of standing is based on a set of constitutional and prudential requirements. To establish standing under article III of the Constitution a litigant must plead an injury in fact fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *Allen v. Wright,* 468 U.S. 737, 751 (1984). Under statutory and prudential standing requirements, standing to challenge an order of the Commission is conferred by § 151 of the Communications Act, which allows appeal to this court by "any . . . person who is aggrieved or whose interests are adversely affected" by such order. 47 U.S.C. §402 (b)(6) (1982).

1. *Standing as Viewers*

In their consolidated brief, the Coalition, HBS and Susan M. Jaramillo (collectively, "Consolidated Petitioners") claim standing as viewers under *Office of Communication of the United Church of Christ v. FCC,* which allows responsible representatives of the broadcast audience to assist the Commission in vindicating the public interest. 359 F.2d 994, 1004-05 (D.C. Cir. 1966). Consolidated Petitioners suggest that the settlement threatens the public's interest in the continuation of Spanish language programming. Their claim of standing

is problematic because there is no evidence to suggest that the anti-alien control provisions of the Act were implemented to advance the public's interest in programming content. We need not resolve this issue, however, because we find that HBLP, HBS, and TVL have standing as prospective competitors to challenge the Commission's approval of the settlement agreement. Since the relief sought by those petitioners encompasses the relief sought by the other Consolidated Petitioners, it is of no moment whether "viewer" standing exists in this case.

2. *Standing as Prospective Competitors*

As a threshold matter we must address the nature of the action brought by petitioner TVL. TVL does not challenge the settlement agreement *per se* but the process which led to the selection of Hallmark as the transferee. It asks us to reverse the Commission's approval of the settlement agreement on the grounds that the Commission failed to address its claim that the bidding process was discriminatory. This cause of action is not reviewable in this court, however, because it essentially seeks a review of the judicial proceedings which occurred in the Ninth Circuit. Neither the Commission nor this court can engage in such review.

The Commission argues that, assuming we uphold its denial of the competing applications, none of the petitioners have standing as prospective competitors for the SICC licenses. It conceded at oral argument that if a reversal of its orders would result in vacant licenses, companies eligible to file applications for those licenses would have standing to challenge the Commission's order. *See, e.g., MG-TV Broadcasting v. FCC,* 408 F.2d 1257, 1264 n.24 (D.C. Cir. 1968) (prospective applicant had standing to challenge assignment of a construction permit where denial of the application would have left the station vacant and available for other applications). The Commission argued, however, that *MG-TV* is limited to cases where the license could become available directly as a result of the court's order. We reject this distinction.

While *MG-TV* involved a substantive challenge which, if accepted, immediately would have rendered the relevant license open to competition, the rationale for prospective competitor standing does not require that we restrict it to such circumstances. This court recently allowed a would-be competitor for a license to challenge an FCC order granting the incumbent licensee permission to sell its broadcast properties to a minority-controlled enterprise pursuant to the Commission's distress sale policy. *See Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). There, similar to this case, the Commission's order sanctioned a sale that would have avoided a renewal hearing. Yet the *Shurberg* court's ruling that the distress sale policy was unconstitutional did not create a vacant frequency but reverted the incumbent licensee to its prior designated-for-hearing status. Apparently the FCC did not contest Shurberg's standing in that case. *See id.* at 906-07. While the *Shurberg* court did not address the issue of standing explicitly, this result is consistent with the general principle underlying standing for frustrated competitors. *Cf. National Maritime Union of America v. Commander, Military Sealift Command*, 824 F.2d 1228, 1237-38 (D.C. Cir. 1987) ("[I]njury to a bidder's right to a fair procurement is obviously an injury both traceable to the alleged illegality in a procurement and redressable by any remedy that eliminates the alleged illegality.").

By analogy, HBLP and HBS claim an injury to their right to a fair license award process both traceable to the Commission's wrongful conduct in approving the transfer to Hallmark and redressable by our remedy which eliminates that conduct, i.e., remand for continuance of the qualification hearing or articulation of a new policy. Similarly, TVL claims a "fair procedure" injury traceable to the Commission's approval of the transfer and redressable, if we were willing to review the merits, by reopening the settlement to permit a reopening of the bidding process. HBLP, HBS, and TVL have all made unsuccessful attempts to become the licensee for the stations at issue

in this dispute. While there is no certainty that this opportunity will be regained upon remand, that possibility is far from remote. Moreover these parties were entitled to expect that a proceeding which was insulating the licenses from competition until its conclusion would not be truncated by an illegal transfer of the licenses to a third party. We therefore find a redressable injury, meeting the constitutional requirements for standing to challenge the Commission's approval of the settlement and transfer.

We disagree with the dissent's suggestion that HBLP and HBS should not be afforded article III standing because they were not within "the zone of active consideration" for the licenses in question. As the dissent correctly notes, this "active consideration" requirement has been imposed as a condition for standing to challenge government contract awards. *See National Maritime Union*, 824 F.2d at 1237-38 n. 12. But to export this reasoning wholesale to the license renewal context ignores critical differences between the license renewal and contract bidding processes. In the classic disappointed bidder case, all potential parties started with a level playing field whereby each applicant brought its resources to bear in vying for a "vacant" contract. In contrast, the typical "frustrated competitor" for an FCC licence has had to vie with the *incumbent* licensee (as well as other competitors) in a process which obviously creates institutional biases toward the incumbent. It is not an "open" bidding contest *per se*. More importantly, once an incumbent's qualifications have been designated for hearing, as was the case here, the incumbent is insulated from competition. For example, HBLP timely filed a competing application for SICC's Miami station license at a time when SICC's renewal application for that licence was in hearing on the issue of alien control. Although we hold below that the FCC correctly declined to accept this application during the pendency of the hearing, this fact illustrates the inappropriateness of the "active consideration" requirement in the FCC licensing context. The dissent's suggestion that

SICC somehow was rendered vulnerable once its qualifications were challenged, opening the door to free and fair competition, could not be further from the actual circumstances of this case. Once SICC's qualifications were in hearing all possibility of competition for the licenses was precluded until the Commission finally resolved the hearing.

The bidding process administered in the Ninth Circuit as a remedy for the shareholder derivative suit can hardly be viewed as an exclusive (or even appropriate) place for applicants to demonstrate their "standing" in the licensing dispute. It was not an official FCC forum for competing for the licenses; indeed FCC policy appeared to prohibit the consummation of any transfer until the conclusion of the hearing. The dissent proceeds to argue that once the FCC decided to truncate the hearing process with the Hallmark settlement, HBS and HBLP could have demonstrated the seriousness of their commitment to obtaining the licenses by at least petitioning to intervene in that proceeding. But this action, too, would not have enabled these companies to gain the FCC's "active consideration" of their own applications.

Such arguments illustrate how the dissent misconstrues the standing inquiry. Standing does not amount to some kind of largesse dispensed at the discretion of article III judges. This circuit has never explicitly imposed a requirement that a "frustrated competitor" for an FCC license demonstrate its prospects for succeeding in the license award process. In *Orange Park Florida T.V., Inc. v. FCC*, on which the dissent heavily relies, this court stated that "contingencies may arise" which could cause the petitioner to "decide not to reapply" or could "defeat its [renewed] application." 811 F.2d 664, 673 n.18 (D.C. Cir. 1987). The *Orange Park* court further stated that it could discern no " 'absolute barriers' " to the petitioner's competing for the license in the future—the outer limit imposed by this court in determining whether an injury is redressable by the relief the petitioner seeks. *Id.* (quoting *Greater Tampa Chamber of Commerce v. Gold-*

schmidt, 627 F.2d 258, 264-65 (D.C. Cir. 1980). It was in this redressability context that the *Orange Park* court noted that the petitioner had "devised plans sufficiently detailed to enable it to compete for the facility." 811 F.2d at 673 n.18. While a would-be competitor certainly could simplify the reviewing court's standing analysis by providing such detail, this statement does not constitute a legal requirement for standing under the law of this circuit. The dissent also cites *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708 (D.C. Cir. 1977), for the proposition that a would-be competitor lacks standing where it fails to demonstrate its capacity to compete in the future. In that case, however, members of a trade association of machinery dealers sought to challenge a sale by the federal government of a manufacturing plant to the Lockheed Corporation. Because none of the members of the association, which were in the business of machinery sales and not defense contracting, had displayed a realistic intent to purchase an entire plant, the foundation for standing was deemed too speculative. *Id.* at 717-19. In contrast, the three companies at issue in this case have actually attempted in the past to bid or compete for the licenses in question.

Equally insupportable is the dissent's attempt to relegate this court's standing ruling in *MG-TV Broadcasting* to the status of a "superseded" case. Despite its appearance in a footnote, until the case is overruled or limited, the *MG-TV* court's reasoning on standing has the force of precedent.

The three companies also satisfy the statutory and prudential requirements for standing. Frustrated license applicants are parties "aggrieved" within the meaning of § 402 (b)(6) of the Communications Act because they have a "concrete, economic interest that has been perceptibly damaged by the Commission's award [of licenses to another competitor.]" *See Orange Park*, 811 F.2d at 673. Having disposed of TVL's claim, we turn then to the substance of the complaints made by HBLP and HBS.

B. *Competing Applications*

Petitioner HBLP presents a threefold argument as to why its competing applications should have been accepted by the Commission at the time the SICC settlement agreement came up for review before the Commission. HBLP reasons: (1) that its application for SICC's Miami facility (WLTV) should have been accepted as a matter of right without the need for a waiver of the cutoff rule; (2) that its application for SICC's San Antonio facility (KWEX-TV) should have been accepted because, due to confusion in the Commission's notices, no valid cut-off date was established; and (3) that the remaining HBLP applications should have been accepted pursuant to a waiver of the cutoff rule because the Commission has not applied its "compelling justification" policy consistently in the past. We reject each of these arguments.

1. *The Miami Application*

HBLP invites this court to address a question left open in a previous case, *Committee for Open Media v. FCC*, 543 F.2d 861, 872-73 (D.C. Cir. 1976): whether the Commission properly can reject an otherwise timely competing application because of the pendency of a *non-comparative* renewal hearing. The "window" was open for filing competing applications in the state of Florida at the time SICC's WLTV renewal application was in hearing on the issue of alien control. But because HBLP's application was mutually exclusive with SICC's, the Commission barred HBLP from filing its application. HBLP argues that the Commission's *Ashbacker* doctrine favoring comparative hearings in broadcast licensing decisions, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), compels acceptance of its competing application. The Commission replies that its longstanding policy against accepting competing applications when qualification issues are under active prosecution is a necessary means for achieving administrative finality. In *Shurberg*, Judge Silberman spoke with approval of this policy rationale, reasoning that designated-for-hearing applications should

be protected from competitive filings so long as the FCC is engaged in ongoing administrative activity. *See Shurberg,* 876 F.2d at 908-09.

We conclude that the Commission acted within its discretion in barring HBLP's competing application for WLTV. While we are not unsympathetic to the argument that an extended qualifications proceeding inadvertently benefits the licensee by insulating it from competition, the circumstances of the case *sub judice* do not give rise to public interest concerns which outweigh the public's interest in administrative finality and efficiency. In *New South Media Corp. v. FCC,* this court held that "with no renewal hearing ongoing . . ., no evidence-taking underway, [and] no proceeding in midstream or even launched," the Commission erred in barring competing applications because doing so would not "require reopening of 'matters once decided,' or 'relitigation' of issues already aired." 685 F.2d 708, 716 (D.C. Cir. 1982) (citation omitted). In reaching this decision, the *New South* court relied on a case in which the Commission ruled that competing applications should be entertained where prosecution of a renewal application had been deferred for three years. *Id.* (citing *Carlisle Broadcasting Associates,* 59 FCC 2d 885, 885 n.1, 889 n.16 (1976)). In contrast, the *New South* court suggested that if a renewal application were actually "in hearing throughout most of the license term and past its expiration," competing applications should not be allowed until conclusion of the proceeding. *Id.* (distinguishing *Committee for Open Media,* 543 F.2d 861).

The two other cases relied upon by HBLP are unavailing. In *La Rose v. FCC,* 494 F.2d 1145 (D.C. Cir. 1974), a renewal hearing was reopened in order to protect innocent creditors by enabling a court-appointed receiver to pursue an opportunity to sell the station in question. In *MG-TV Broadcasting Company v. FCC,* this court held that the Commission erred in extending a construction permit where the holder of the permit had made no significant progress toward construction and lacked good faith. Instead, a comparative hearing was required. 408 F.2d

1257 (D.C. Cir. 1968). Unlike the cases discussed thus far, HBLP's argument offers no countervailing interest, other than the public's broad interest in competition, for opening an ongoing qualifications hearing to competing applications. Moreover, HBLP does not offer any specific evidence to support its claim that its application would only marginally extend the renewal proceeding. Yet, a qualifications hearing might extend into the next license period if competing applications dictated the "reopening of the hearing record for cross-examination of previous witnesses, objection to exhibits already admitted, introduction of new evidence, and retrial of issues." *Committee for Open Media*, 543 F.2d at 873. In light of these considerations, the Commission did not abuse its discretion in refusing to accept HBLP's application for the WLTV facility.

2. *The San Antonio Application*

HBLP claims that no valid cutoff date was established for applications competing for one of SICC's licenses—that of KWEX-TV. It argues that the Commission failed to follow proper procedure in alerting potential applicants that the filing period for competing applications would not be truncated by its order designating for hearing SICC's KWEX-TV renewal application. HBLP effectively concedes that the Commission's official notice in the Federal Register was accurate. Petitioner argues, however, that the Commission erred in issuing a news release, prior to the official notice, which announced the designation for hearing without noting that the normal window for competing applications would be maintained. In its order below, the Commission rejected this claim because HBLP failed to demonstrate that it or any other applicants were actually confused or deterred by the news release; alternatively the Commission relied on its official notice.

We affirm the Commission's ruling because: (1) HBLP did not attempt to file a competing application at the relevant time and no prejudice has been demonstrated to any other applicants; *cf. Salzer v. FCC*, 778 F.2d 869, 875 (D.C.

Cir. 1985) (filing intructions were vague and ambiguous and 44 of 53 applicants apparently were misled by them); and (2) the official notice was accurate and was released before the close of the window.

3. *Denial of Waivers*

HBLP asserts that the Commission erred in denying waivers of its cutoff rule for its remaining competing applications (and for the Miami and San Antonio applications in light of the failure of the above claims). It argues that the Commission has not applied its "compelling justification" basis for waivers consistently in the past and reasons that the lack of an established "strict" waiver policy impels the Commission to grant waivers in the case *sub judice*. We find this argument without merit.

The FCC precedents relied upon by HBLP upheld waivers based upon persuasive showings of impossibility, hardship, or other arguments demonstrating a clear public interest in allowing the waiver. HBLP has not identified any Commission precedent similar to this case where applicants seek waivers three years after the cutoff date and offer only the public's interest in competition as a justification for the waiver. Moreover, HBLP has not offered any explanation as to why, with the exception of the Miami application, the competing applications were not timely filed. We affirm the Commission's ruling because it has offered a reasonable distinction between this case and occasions in the past when waivers of filing deadlines have been granted.

C. *Deviation from* Jefferson Radio

As a threshold matter petitioner HBLP argues that by approving the settlement agreement the Commission violated §§ 301 and 304 of the Act, which preclude property rights in broadcast licenses. Similarly, HBS argues that § 310(b) absolutely precluded the Commission from granting a license to SICC for any purpose after the ALJ's finding of *de facto* alien control. We need not resolve these questions, however, because we find that the Commission

violated its policy as upheld in *Jefferson Radio*. HBLP also argues that the Commission, pursuant to § 309 of the Act, should have provided notice and an opportunity for public participation prior to consideration of the settlement because the settlement raised issues of substantial public concern. We reject this argument. Nothing in § 309 requires the Commission to solicit public comment on settlement agreements in adjudicatory proceedings. *See* 47 U.S.C. § 309 (1982). On the contrary, the Act limits the right of petition to deny an application to a "party in interest." 47 U.S.C. § 309(d)(1).

Petitioner HBLP charges that by approving a full market sale to Hallmark prior to the conclusion of the renewal proceeding, the Commission made an *ad hoc* exception to the policy upheld in *Jefferson Radio* without articulating a clear rationale for this departure. We agree.

The content and rationale of the *Jefferson Radio* policy are adequately explained in a previous opinion of this court:

> Under a long-standing policy formulated by the [Commission] and upheld by this court, *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964), radio station licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, are forbidden to transfer control of these licenses. Established on the premise that "a licensee . . . has nothing to assign or transfer unless and until he has established his own qualifications," *Northland Television, Inc.*, 42 Rad. Reg. 2d 1107, 1110 (1978), the policy stems from the Commission's concern for the continued effectiveness of the deterrent provided by, in the appellant's words, the "awesome potential for economic loss that attends deprivation of license."

Stereo Broadcasters, Inc. v. FCC, 652 F.2d 1026 (D.C. Cir. 1981). As the Commission has observed:

> [W]here an evidentiary hearing has been designated on a renewal application or show cause order to

> determine disqualification questions, permitting the suspected wrongdoer to evade sanction by transferring his interest or assigning the license without hearing will diminish the deterrent effect which revocation or renewal proceedings should have on broadcast licensees. *Only under exceptional circumstances giving rise to compelling equitable considerations will the Commission grant renewal to such an applicant and authorize a concomitant license assignment or transfer of control. . . . Additionally the assignor must show he will derive no unwarranted [financial] benefit from a grant of renewal . . . conditioned upon the proposed transfer or assignment.*

Northland Television, 42 Rad. Reg. 2d at 1110 (emphasis added).

The Commission has found compelling equitable circumstances in cases where the assignor is disabled or where the licensee's assets are held by a receiver in bankruptcy for the benefit of innocent creditors. *Id.* at 1110 n.4. In those rare cases where the Commission, prior to final resolution of a renewal hearing, has approved transfers falling outside these recognized exceptions, the transfer was made with a substantial monetary penalty to the transferor. *See, e.g., RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057, 5062 (1988) (assignor to get $105 million less than purchase price and settlement would avoid years of further litigation); *A.S.D. Answering Service Inc.*, 1 FCC Rcd 753, 754 (1986) (surrender of a construction permit and three licenses and dismissal of all low band licensing application plus firing of all employees whose conduct was at issue); *George E. Cameron Jr. Communications*, 56 Rad. Reg. 2d 825, 828 (1984) (transferee assumed $6.5 million in debt, relinquished rights in another station, and returned a silent, failed station to the air and tranferors received no compensation whatsoever).

The Commission presents three arguments in support of its claim that its actions are consistent with *Jefferson Radio*. First, it argues that the policy prohibits transfers only when the potential benefits in the proposed assign-

ment are outweighed by a countervailing and overriding public interest in the Commission retaining effective control over the conduct of its licensees. The Commission's reliance on *Northwestern Indiana Broadcasting Corp.*, 60 FCC 2d 205 (1976), as precedent for this balancing approach, however, is misplaced. In *Northwestern*, the Commission declined to accept a settlement proposal which would have avoided a lengthy qualification hearing by transferring the station to a third party. The Commission reached this conclusion even though the proposed transfer was approved by the party which precipitated the qualification hearing and would have given a majority black community its first black radio station. *Id.* at 209-10. The Commission invoked balancing language to explain the deterrence rationale underlying *Jefferson Radio*, reasoning that *despite* its potential benefits, the settlement was precluded by the "countervailing and overriding public interest" in maintaining the deterrence function of its hearing processes. Rather than establishing a balancing test, the Commission in *Northwestern* unequivocally adhered to *Jefferson Radio*, precluding the settlement because it did not fall within established exceptions. *Id.* at 210-11.

The dissent suggests that this court has constructed *Jefferson Radio* as some kind of rigid doctrine to frustrate the Commission's desire to distribute justice in its licensing process. We take the doctrine as the Commission established it. Obviously the Commission is free to change the doctrine, as long as it explains why and what it is doing, and complies with its process requirements.

Thus the Commission's argument that it properly weighed the factors favoring approval of the settlement agreement against its interest in deterrence is without merit. Equally unavailing is the Commission's second argument that there are no guiding precedents in this case because it involves subjective inferences of *de facto* control under § 310 (b) and because SICC was an incumbent licensee of 20 years. The Commission reasons that the "illusive nature" of *de facto* control counsels against a

harsh remedy in the absence of specific precedent to guide a licensee. The authority upon which the Commission relies, however, does not support this contention. This court in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971), upheld the Commission's decision to impose a remedy having a harsh effect even though there was not an explicit precedent giving notice to the licensee that it was required to report a change in *de facto* control. The *Greater Boston* court did state that use of a sweeping rather than a more refined administrative remedy may in some instances represent an improvident use of administrative discretion. *Id.* It did not, however, provide examples of such instances and its holding counsels against the position which the Commission asserts in this case.

Third, the Commission attempts to use the fact that this case involves *de facto* control to distinguish it from precedents requiring sales in exception to *Jefferson Radio* to be made at diminished value. The Commission argues that the misconduct at issue in those cases was more egregious than in this case because: (1) with no alien having exceeded the 20% stock ownership limitation or having served as an officer or director, SICC complied with the two statutory benchmarks for *de jure* control; and (2) SICC made no attempt to conceal the relationships at issue nor did its conduct involve any misrepresentations or character violations. Offsetting the allegedly "technical" misconduct against, *inter alia*, the "unique" contributions of SICC to broadcasting and the administrative convenience of the settlement, the Commission concluded that the equities of the case distinguished it from other cases warranting harsher treatment.

This distinction is specious for two reasons. First, none of the "diminished value" cases turn on the egregiousness of the conduct in question. As described above, all of these cases are premised on a clear requirement that exceptions to *Jefferson Radio* falling outside the established categories of insolvency or disability be made only at substantial monetary cost to the assignor. Even under

the established exceptions the Commission has required adequate showings not only of compelling equitable circumstances but also of reduced financial benefit for the assignor. *See Northland Television*, 42 Rad. Reg. 2d 1107 (licensee had to make adequate showing that its principal suffered disability and that the proposed transfer would not result in a profit to the assignor).

Second, SICC's conduct is not rendered less serious simply because the ALJ found that the violation involved *de facto* control. Clearly, the complex pattern of interlocking relationships scrutinized by the ALJ were developed for the precise purpose of avoiding the *de jure* restrictions in § 310 (b). The ALJ's extensive findings demonstrate that conduits for alien influence can be created that have the potential to be just as effective as *de jure* violations. For example, in the early days of SICC's tenure as a broadcaster, the Azcarragas advanced emergency funds to the stations, provided programming to the stations while deferring payment for years, and opened collateral deposit accounts for the stations to draw upon in order for the stations to receive financing from United States banks. In addition, a number of the officers and directors of the SICC stations had significant pre-existing associations with the Azcarraga media empire and became principal investors in various licensee stations with the benefit of Azcarraga financing. *Initial Decision* at ¶¶ 80-114. While we reach no conclusions as to whether such conduct constitutes a violation of § 310(b), we are unpersuaded that the distinction between *de jure* and *de facto* conduct has any relevance for the purposes of maintaining the deterrence rationale which informs the *Jefferson Radio* policy.

The abuse-of-process allegations raised in the exceptions to the ALJ's decision also undercut the Commission's assertion that SICC's conduct was distinguishable from that addressed in the other diminsished value cases. The Commission's own Mass Media Bureau attempted to add an abuse-of-process issue to the hearing before the ALJ—a petition which the ALJ denied. The Bureau then filed an exception which charged that SICC harrassed and

intimidated SRBA and other potential witnesses for having brought information about SICC's conduct to the attention of the Commission. For example, SRBA alleged that SICC filed more than thirteen apparently baseless antitrust suits against potential witnesses to chill adverse petitioning before the Commission. The Commission asserts that because SRBA withdrew its exception—pursuant to a settlement of the antitrust litigation brought by SICC against SRBA and associated parties—it did not feel compelled to investigate this claim. The terms of SRBA's settlement with SICC are not in the record; hence we do not know what induced SRBA to withdraw the abuse-of-process claim and to file a petition in support of the transfer to Hallmark. Certainly, if SICC intended to "buy" its way out of the abuse-of-process charges, the Commission ought not to facilitate such a result by not investigating the charges. While we are not suggesting that the Commission is obliged to reopen the abuse-of-process claims, these circumstances further persuade us that this was not a case of mere "technical" allegations sufficient to escape the requirements of *Jefferson Radio.*

Finally, the Commission urges a "remedy" for a possible violation of § 310 (b), prior to the final resolution of the issue, which is an extreme departure from prior precedents: a full market sale at $300 million with no apparent burdens to SICC other than barring SICC principals from becoming officers or directors of the assignee for two years. Intervenors, indirect subsidiaries of Hallmark, point out that in the past the Commission has ratified unauthorized transfers of control by approving a subsequent application to transfer while exacting only a $10,000 fine against the incumbent licensee. *See Bartell Broadcasters, Inc.*, 19 FCC 2d 890 (1969); *Areawide Communications, Inc.*, 12 FCC 2d 170 (1968). Yet in neither of these cases had the qualifications or renewal application of the incumbent licensees been designated for hearing *prior* to the request for official authorization of the transfers. Moreover, in both cases the Commission made

a final determination that there had been a willful violation of the Act's restriction on unauthorized transfers *before* approving the transfer and assessing a fine. In contrast, in this case the Commission truncated a renewal proceeding prior to finally resolving the issues which had been designated for hearing. We also note that the qualifications of the incumbent licensees were not at issue in *Bartell* and *Areawide.* Instead of a substantive qualifications violation, those cases dealt with the fact that ostensibly acceptable transfers had been effected by the incumbent licensee without the official authorization of the Commission.

We agree with petitioners that the relief granted by the Commission in this case constitutes a substantive departure from *Jefferson Radio* which warrants a reasoned explanation. Moreover, if on remand the Commission chooses to modify this policy, it must articulate clearly the content and scope of the new policy. In particular, if the former bar to transfers at full market value is to be replaced with a "balancing" test that weighs, *inter alia,* the degree of misconduct in question (even though a final determination will not have been made on this issue), the Commission should explain what constitutes serious misconduct sufficient to bar profits. Alternatively, the Commission may complete the proceedings that were pending at the time it approved the settlement agreement and then fashion a remedy that furthers the goals of its stated and known policies.

III.

We find that HBLP, TVL, and HBS have standing as prospective competitors to challenge the Commission's approval of the settlement agreement and transfer to Hallmark. We uphold the Commission's decision not to accept competing applications for the licenses in question. We find that the Commission violated its policy, as upheld in *Jefferson Radio,* of precluding assignment at full value of a broadcast license until it has finally determined that

the assignor has not forfeited its right to a license. Therefore, we remand to the Commission to complete the proceeding pending at the time the settlement agreement was approved or to articulate a new policy that explains why *Jefferson Radio* is no longer an appropriate precedent and to justify the transfer to Hallmark without completing the pending renewal proceeding.

It is so ordered.

WILLIAMS, *Circuit Judge*, dissenting in part and concurring in part of the judgment: After extensive hearings before an administrative law judge, the FCC here approved a settlement that was satisfactory to all active participants in the administrative proceedings. Under its terms the FCC renewed Spanish International Communications Corporation's disputed licenses but required their transfer to a third party. At the behest of two firms that may, for all we know, be no more than litigative shells, that played no material role in the administrative proceedings involving renewal, and that made no timely filings seeking comparative hearings for the licenses, the court today upsets the settlement. As I believe that neither firm has suffered a material injury, I dissent.

The two firms, Hispanic Broadcasting System and Hispanic Broadcasting Limited Partnership, claim standing as prospective license applicants. But as neither ever filed a timely application for the license they seek, neither appears before us as a runner-up, as did the petitioner in *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664 (D.C. Cir. 1987), or even as a defeated contestant. In fact, if these parties are serious about competing for the stations (should they become vacant), they haven't told us about it, and their performance before both the Commission and the court supplies no basis for believing they are. They appear more as observers who have been lollygagging around the track while others strove. They have not demonstrated the "personal stake in the outcome of the controversy" necessary to satisfy the constitutional requirements of Article III. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotations omitted).

It is true, of course, that nonrenewal of Spanish International's licenses, if it were ultimately to result from invalidation of the settlement, would create vacancies for which HBS and the Partnership could compete. Given the edge the Commission allows incumbents in a comparative hearing, see *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982) ("renewal expectancy" of incumbent licensee may be a factor in comparative proceedings),

the existence of a vacancy is a potential advantage. Further, neither a potential license contestant, nor a disappointed bidder, nor others claiming standing on comparable grounds, is by any means required to show for purposes of standing that it would have carried off the prize but for the alleged illegality. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (plaintiff seeking federal housing assistance); *Regents of the University of California v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978) (medical school applicant); *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1574-75 (Fed. Cir. 1983) (disappointed federal contract bidder). Finally, in many such cases courts have framed the complainant's injury simply as the loss of an *opportunity* to compete. See, e.g., *C C Distributors, Inc. v. United States*, 883 F.2d 146, 151 (D.C. Cir. 1989) (disappointed bidder).

This hardly means, however, that anyone can wander in off the street, pronounce himself a potential contestant, and thereby recruit the courts to upset a decision of a coordinate branch of government. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881 (1983). Some indication of realistic prospects is also needed. As Judge Posner has observed, a medical school applicant could challenge a racial exclusion without proving that in its absence he would be admitted, but "he would not have standing if he was two years old." *Planned Parenthood Ass'n of Chicago v. Kempiners*, 700 F.2d 1115, 1137 (7th Cir. 1983) (concurring); see also *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893 (3rd Cir. 1981) (no standing to challenge affirmative action program where plaintiff was otherwise clearly unqualified for admission).

The rationale for requiring an indication of serious prospects is simple enough: a lost opportunity is no loss at all if there is no realistic chance of winning once the supposed illegality is corrected. Those who without such prospects nonetheless bring suit are presumably either seeking to enjoy its nuisance value, see *National Federa-*

tion of Federal Employees v. Cheney, 883 F.2d 1038, 1053 (D.C. Cir. 1989), or acting out of the sort of ideological interest that the Supreme Court has declared insufficient to confer standing. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

In instances where an agency has held a contest and the plaintiff entered, it is typically plain from the record whether its prospects were serious. In the disappointed bidder cases that has often been true, and there we have insisted that the petitioners have been " 'within the zone of active consideration' for the bid's award." *National Federation*, 883 F.2d at 1053 (quoting *National Maritime Union v. Military Sealift Command*, 824 F.2d 1228, 1237-38 n.12 (D.C. Cir. 1987)). In many cases disappointed contract bidders found to have standing were in fact runners-up in the contest whose validity was challenged. See, e.g., *Choctaw Manufacturing Co. v. United States*, 761 F.2d 609, 613 (11th Cir. 1985); *CACI, Inc.*, 719 F.2d at 1575; *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir. 1975); but cf. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 842 & n.3 (D.C. Cir. 1982) (dictum that second-lowest bidder in original procurement had not shown enough likelihood of success on recompetition to challenge agency's failure to terminate contract). Similarly, in *Orange Park*, an FCC case where we drew heavily on the disappointed bidder analogy, the plaintiff was the sole other applicant for the contested license. But for the Commission's alleged error in allowing the winning applicant to make a curative amendment, plaintiff could have itself made an amendment curing its only apparent deficiency. 811 F.2d at 670-73.

I have considerable doubt whether the present case calls for anything less than a showing by HBS and the Partnership that they were within the "zone of active consideration" — which they obviously were not. It is not the FCC's fault, but theirs, that we have no clue as to their qualifications; these parties could have fought for Spanish International's licenses in what would have been the equivalent of an open contest. The complaint ques-

tioning Spanish International's qualifications was filed with the Commission in 1980, see J.A. 16 (designation order), and yet neither HBS nor the Partnership submitted competing applications for three Spanish International licenses up for renewal in 1982 and 1983, see *Spanish International Communications Corp.*, 2 FCC Rcd 3336, 3337 (1987), at which times the Commission would have been required under its regulations to accept conforming submissions. See 47 CFR § 73.3517(e) (1988). (The cut-off rules do not kick in during the investigation of such complaints, but only when designation for hearing occurs — in this case, not until June 1983.) The only applications they did manage to proffer were no less than three, and as many as seven, years late. See *Spanish International*, 2 FCC Rcd 3336, 3336-37, 3342 n.8 (1987). Since the settlement they have passed up further opportunities to compete. See Commission Brief 29 n.20 (no competing applications were filed against Hallmark's request for license renewal after the settlement). These parties were not even also-rans, much less runners-up.

Nonetheless, one might argue that HBS's and the Partnership's prospects should be tested as if they had had no opportunity to compete, on the theory that Spanish International's status as incumbent made their opportunities so unappealing as to excuse their failure to apply. (This requires disregard of Spanish International's vulnerability once its qualifications were challenged.) Where for some reason no contest has been run, or the plaintiff for some other reason has had no chance to demonstrate whether it would place, courts have applied laxer standards. Thus in *C C Distributors*, allegedly illegal action cut off any opportunity to bid, but we relied on plaintiffs' "demonstrated capacity to compete for and to obtain [similar] contracts" as assurance that an opportunity to compete "would not be illusory." 883 F.2d at 151. See also *Hayes International Corp. v. McLucas*, 509 F.2d 247, 251 (5th Cir. 1975) (petitioner had held contract similar to one whose award was challenged).

HBS and the Partnership would go even farther, relying on *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257 (D.C. Cir. 1968), for the notion that a possible license applicant can secure standing whenever the denial of others' applications (which here would follow *if* agency proceedings took a favorable turn on remand) "would have left the station vacant and available for appellant's application." *Id.* at 1264 n.24. If correct, of course, such a rule would afford *anyone* standing, as any vacancy creates such a theoretical opportunity for the whole world. But the court's five lines of footnote addressing the point do not suggest that anyone had raised the issue of MG-TV's prospects, and indeed no party had raised the standing issue at all. See Briefs of the Commission, MG-TV Broadcasting Co., and Intervenor Seven Arts Broadcasting Co., Inc., *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257 (D.C. Cir. 1968) (No. 21,224). To the extent that *MG-TV* represents such a holding, our later decision in *Orange Park*, which wrestled at some length with the problem and did not find *MG-TV* worthy of citation, clearly supersedes.[1]

It is true that *Orange Park* eschewed any prediction of the likelihood of the plaintiff's ultimately prevailing. 811 F.2d at 672-73 n.18. But we reached that conclusion only after having determined that plaintiff "has devised plans sufficiently detailed to enable it to compete for the facility." *Id.* The court emphasized that the petitioner could readily cure the deficiency in its original submission, that it stood "ready, willing and able" to reapply for the license, and that its intention to do so was "manifestly evident" from the record. *Id.* at 672-73 & n.18. These represent the minimum requirements that one can extract from our cases.

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[1]The various opinions in *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), assumed standing and did not assess the seriousness of Shurberg's quest. In any event, cases in which jurisdiction is assumed are not authority for the existence of jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984).

Thus I turn to the record in a search for some hint that, if court action led to HBS's or the Partnership's having an opportunity to compete, it would be better than "illusory." None appears. As noted, neither HBS nor the Partnership made any timely application for the licenses. Nor did either see fit even to join in the initial battle to unseat Spanish International. Such a commitment would have been at least an earnest of seriousness. Under Commission regulations, either could have petitioned to intervene in the proceedings as a matter of course within 30 days of the designation order of June 16, 1983. See 47 CFR § 1.223 (1988) (rules for intervention); J.A. 15 (designation order). The Partnership's attempt to intervene fell three years too late, and the Review Board rejected its petition as "grossly out of time and defective." *Spanish International,* 1 FCC Rcd 844, 847 n.2 (Rev. Bd. 1986). Its sole excuse, that it was not yet in existence by the relevant deadline, see J.A. 377, only underscores the ramshackle character of its interest. (The Commission upheld the Review Board's ruling on intervention, and afforded the Partnership only *amicus* status. *Spanish International,* 2 FCC Rcd at 3338 n.15.)

HBS did manage to participate, but very indirectly, and in what was perhaps the least promising avenue for challenging the Commission's consideration of the transaction. Instead of petitioning to deny the conditional renewal of Spanish International's license, it attacked only the transferor's application to assign the license once renewed. J.A. 146. As even the Partnership concedes, this track did "not . . . provide[ ] a meaningful opportunity to challenge the decision to permit the settlement," Partnership Brief 20 n.6, since Commission assent to renewal would necessarily entail assent to the assignment.

Finally, even before the court the roles of HBS and the Partnership suggest the improbability that either would be "ready, willing and able" to compete on a serious basis for the licenses should they fall vacant. Neither party asserts that it would in fact qualify as a licensee, cf. *DKT Memorial Fund, Ltd. v. AID,* 810 F.2d 1236 (D.C. Cir.

1987), nor do they stoop even to state that they intend to compete for the stations should the vacancies occur. Neither has offered reason to believe that, in *Orange Park*'s words, it "has devised plans sufficiently detailed to enable it to compete for the facility." 811 F.2d at 672-73 n.18. See also *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717-19 (D.C. Cir. 1977) (no injury sufficient to challenge excess property sale where plaintiff had not demonstrated capacity to compete for purchase). Nor is this a case in which the mere fact of appeal might allow us to assume such qualification or intention. See *National Maritime*, 824 F.2d at 1237 n.12 ("[p]resumably a bidder who believed that it would have no significant likelihood of obtaining the bid on re-solicitation would not bring suit"). As HBS appears simply as one signer of a joint brief with the closely related viewer petitioners, its continued role is as easily attributable to the interest in providing a back-up theory of standing as to any real interest in seeking the licenses. (It did not even bother to appeal the Commission's dismissal of its belated applications.) As for the Partnership, a successful challenge to the Commission's cut-off rules would have made it the sole candidate for the licenses other than Spanish International.[2] But that alone gives no hint that it would be anywhere near the ballpark in an *open* competition, which is the sort that could result here and which would likely attract some heavy hitters. Thus, what distinguishes HBS and the Partnership from the rest of the world is that they belatedly filled out a few forms. That is not enough.

By contrast, TVL was plainly within the zone of active consideration. It was one of two finalists in the sales process supervised by the California district court, at least

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[2]Because the Commission's application of its timeliness rules prevented the Partnership from demonstrating its ability to place, it clearly could secure standing to challenge that denial without showing that it would have been "within the zone of active consideration." But without some indication of ability to meet the Commission's minimum qualifications, as required in *Orange Park*, it should not have standing even to attack the denial.

three other bidders having been eliminated elsewhere along the way. At the time the court approved Hallmark's offer TVL had firm financing commitments for $250 million of a $320 million bid; within a mere three days it had lined up the other $70 million. If its claim of racial discrimination in the district court proceedings were meritorious, and if Commission approval of the settlement in the face of such discrimination were substantively invalid, its proposed remedy — delay of the settlement to allow reconsideration of its original bid in the light of its later acquisition of full financing — would plausibly give it a shot at the licenses. As TVL does not challenge the settlement on *Jefferson Radio* grounds, however, its standing provides no support for today's outcome.[3]

As the majority finds standing for HBS and the Partnership it need not resolve that of the self-identified viewer petitioners, the Coalition for the Preservation of Hispanic Broadcasting and Susan Jaramillo. Maj. Op. at 10-11. As the court notes, there is no evidence to suggest that Congress adopted § 310(b)(3)'s restrictions on alien control in order to advance the public's interest in programming content. Indeed, such evidence as the parties have uncovered suggests a national security purpose. See Maj. Op. at 4. Moreover, whatever may have animated Congress, it surely did not *restrict* foreign license owner-

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[3]On the merits of TVL's claim, I concur in the court's result, but on somewhat different grounds. Its filings before the Commission never made clear its current theory that Commission approval of a transfer to Hallmark violated the Equal Protection clause because it would incorporate or build upon the alleged discrimination in the district court proceedings. Whatever the merits of this claim, it appeared before the Commission more as a wholly implausible effort to get the Commission to set itself up in judgment over the district court and Ninth Circuit on constitutional matters, with no explicit claim of discrimination *by* the Commission. See TVL Petition to Deny, Sept. 26, 1986 (J.A. 213); TVL Application for Review, July 24, 1987 (J.A. 458). Accordingly, it fails under the principle that a sow's ear argument before an agency does not require the agency to make a silk purse response. See *City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C. Cir. 1988).

ship in order to *enhance* non-English-language programming. Thus the Coalition's interest in preserving Spanish-language programming, J.A. 390, is "so ... inconsistent with the purposes implicit in the statute" that their standing would be wholly inappropriate. See *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987).

For her part, Jaramillo objects to "foreign domination" of the supply of Spanish-language programming, J.A. 491, so that if § 310(b)(3) reflected any interest in programming content, she might occupy at least a non-adverse relation to its goals. But her standing fails for want of a material injury. Since the settlement eliminated the possibility of alien domination over the stations, her interest in all-American Spanish-language programming could benefit from this litigation only to the extent that Commission rejection of the settlement might have tended to deter future violations of § 310(b). This is too speculative to satisfy Article III. Compare *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973) (invalidation of state's refusal to enforce criminal non-support laws against fathers of illegitimate children bears too speculative a relation to any prospect that mother of illegitimate child would fare better in extracting child support from father).

Nor can either the Coalition or Jaramillo stand upon the purposes of the *Jefferson Radio* doctrine, for it is entirely instrumental, aimed only at enhancing the deterrent effect of whatever substantive provision supports the attack on the incumbent licensee, here § 310(b)(3). See *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1027 (D.C. Cir. 1981).

Thus, of the four petitioners who challenge the settlement on *Jefferson Radio* grounds, three show no material injury and the Coalition asserts an interest that is in apparent conflict with the purposes of § 310(b). Yet at the behest of the two purported license applicants the court today upsets a carefully arranged and (so far as appears) useful agreement. The settlement cures whatever violation of § 310(b)(3) may have existed. It frees Commission

time for other matters. It satisfies the group that pressed the § 310(b)(3) challenge before the Commission, the Spanish Radio Broadcasters Association. And, so far as *Jefferson Radio*'s object of maintaining deterrent effect is concerned, the record reveals no hint that violations of § 310(b)(3) are so widespread as to require much deterrence.

* * *

As I believe that we have no jurisdiction over the *Jefferson Radio* issue, I neither join nor dissent from the opinion on that point. But compare *McKelvey v. Turnage*, 792 F.2d 194, 209 (D.C. Cir. 1986) (Scalia, J., dissenting from jurisdiction but joining on merits). A few words may be in order, however, lest the majority opinion be misinterpreted on remand. Compare *Atari Games Corp. v. Oman*, No. 88-5296, slip op. at 1 (D.C. Cir. Oct. 31, 1989) (Silberman, J., concurring). As I understand the opinion, it reads the Commission's *Jefferson Radio* doctrine as absolute, one of unwavering unwaivering, subject only to specific, discrete exceptions. The Commission's fault is the perceived inadequacy of its explanation for softening the doctrine. On remand, therefore, the Commission is free, for example, to explicitly change the doctrine into a balancing test, so long as it explains adequately. See, e.g., *NLRB v. Local Union No. 103*, 434 U.S. 335, 351 (1978) ("[a]n administrative agency is not disqualified from changing its mind"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971).

Whatever the merits of the majority's reading of *Jefferson Radio*, I am puzzled by its concern over the Commission's decision not to pursue the claims of Spanish Radio Broadcasters of America that Spanish International had brought antitrust actions against it as a form of harassment. Maj. Op. at 24-25. The ALJ rejected these claims as lacking sufficient evidence of bad faith, and the claimant has withdrawn them as part of the settlement. The court expresses concern that the withdrawal may have been motivated by an exchange of consideration. *Id.*

at 25. I would not be surprised; that is how many conflicts before the FCC come to an end. But if the Commission must press every *abandoned* suggestion of hanky-panky through to the bitter end, or must satisfy itself that the accuser in retreat was pure of heart, uncorrupted by any trade-off, it will never be able to get on with its business. The FCC is not some sort of general morals police.

That aside, regardless of what course the Commission might take on remand, the context — agency choice among remedies — requires much discretion for the agency and deference from the court. See, e.g., *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958) (noting resource allocation problem and need for specialized, experienced judgment). Remedial choices demand both a grasp of the scope of the evil to be remedied (and thus how much deterrence is needed), and a predictive judgment as to deterrent effects. Judges are unlikely to be able to contribute much on either issue. See generally *FCC v. WOKO, Inc.*, 329 U.S. 223, 228-29 (1946); *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 622 (D.C. Cir. 1982); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965). Moreover, the need for judicial deference is at its peak where (as here) the remedy is secured as part of a settlement. The Commission is effectively making a decision as to the allocation of its resources — a decision whether the gain in deterrent effect that might flow from pursuing the case to the hilt is worth the loss, in terms of energy deflected from other matters. See *Board of Trade v. SEC*, 883 F.2d 525, 530-31 (7th Cir. 1989) ("declining a particular case hardly means that the [agency's staff] will go twiddle their thumbs"); cf. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Oddly, if the Commission on remand were to affirm the ALJ's finding of a violation, it could settle with Spanish International untrammeled by the *Jefferson Radio* doctrine and in full enjoyment of the deference that is well-established for remedial choices. See *Bartell Broadcasting Inc.*, 19 FCC 2d 890 (1969); *Areawide Communications, Inc.*, 12 FCC 2d 170 (1968) (both allowing transfer at full market value despite licensee violations of 47 U.S.C. § 310(d)).

We should not interfere with the Commission on this matter, at the instigation of parties with such feeble stakes.

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 87-195
37099

MM DOCKET NOS. 83-540 to 83-544 and 84-830 to 84-834

In the Matter of
SPANISH INTERNATIONAL
COMMUNICATIONS CORPORATION

File Nos. BRCT-830401LM et al.

For Renewal of License of KWEX-TV San Antonio, Texas, et al.

MM DOCKET NO. 83-545 File No. BRCT-800730KJ

BAHIA DE SAN FRANCISCO TELEVISION COMPANY
For Renewal of License of KDTV(TV) San Francisco, California

MM DOCKET NOS. 83-657 and 84-835

THE SEVEN HILLS TELEVISION COMPANY

File Nos. BRCT-830601KJ and BPTT-840308IQ

For Renewal of license of KTVW-TV Phoenix, Arizona, et al.

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1987 Released: June 2, 1987

By the Commission:

1. By a series of Orders, 48 Fed. Reg. 28,549 (1983), 48 Fed. Reg. 33,539 (1983) and 49 Fed. Reg. 35,691 (1984), we designated for hearing the renewal applications of Spanish International Communications Corporation (SICC), Bahia de San Francisco Television Company (Bahia), and Seven Hills Television Company (Seven Hills) on, *inter alia*, an issue to determine whether the stations were under alien control in violation of Section 310(b) of the Communications Act.[1] In an Initial Decision, FCC 86D-1, released January 8, 1986, Administrative Law Judge John H. Conlin found that the corporate licensees had violated Section 310(b) of the Communications Act and that they were not basically qualified to remain Commission licensees. On September 26, 1986, the Review Board approved a settlement agreement among SICC, Bahia, the Mass Media Bureau, and two other parties to this proceeding—Fouce Amusement Enterprises, Inc. (Fouce) and SIN, Inc.

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[1] The designated applications include: (1) renewal applications for five full power television stations licensed to SICC (Stations KWEX-TV (San Antonio, Texas), KMEX-TV (Los Angeles, California), WXTV(TV) (Paterson, New Jersey), WLTV(TV) (Miami, Florida), and KFTV(TV) (Hanford-Fresno, California)), (2) a renewal application for one full power television station licensed to Bahia (Station KDTV(TV), San Francisco, California); (3) a renewal application for one full power television station licensed to Seven Hills (Station KTVW, Phoenix, Arizona); (4) a renewal application for a television translator licensed to SICC (W35AB, Philadelphia, Pennsylvania); (5) an application to operate a television translator filed by SICC (K39AB, Bakersfield, California); (6) a CP application for a television translator filed by SICC (W47AD, Hartford, Connecticut); (7) a CP application for a television translator filed by Seven Hills (K52AO, Tucson, Arizona); and (8) CP applications for two low power television stations filed by SICC (K30AK, Austin, Texas, and K41AI, Denver, Colorado).

(SIN)[2]; conditionally granted the renewal applications filed by SICC and Bahia subject to the prompt transfer of their authorizations to qualified, unrelated buyers; and terminated the proceeding with respect to SICC and Bahia. *Spanish International Communications Corp.*, 1 FCC Rcd 92 (1986), *recon. denied*, 1 FCC Rcd 844 (1986). The settlement agreement does not include Seven Hills, and renewal applications for Seven Hills' stations are still pending before the Review Board. By an Order (FCC 87R-1, 2 FCC Rcd 511, released January 26, 1986), the Board stayed the Seven Hills proceeding pending Commission action on the SICC/Bahia settlement agreement. *Seven Hills Television Company*, 2 FCC Rcd 511 (Rev. Bd. 1986).

2. Now before the Commission are: (a) Petition for Acceptance of Applications, filed December 9, 1986, by Hispanic Broadcasting, Ltd. (HBL);[3] (b) Opposition to Petition for Acceptance, filed December 24, 1986, by Spanish International Communications Corporation and Bahia de San Francisco Television Company; (c) Opposition to Petition for Acceptance of Applications, filed December 24, 1986, by Hallmark Acquisition, Inc. and SICC Acquisition Corp.; (d) Opposition to Petition for Acceptance, filed December 23, 1986, and Erratum thereto, filed December 29, 1986, by Rene Anselmo and Seven Hills Television Company; (e) Reply to Oppositions to Petition for Acceptance for Applications, filed January 8, 1987, by Hispanic Broad-

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[2] SIN is a Spanish language television network that also engages in the business of national spot advertising. Fouce Enterprises, Inc. has a 25.5% interest in SICC.

[3] Hispanic Broadcasting, Ltd. also filed a petition for waiver on November 10, 1986, which SICC and Bahia oppose. HBL requests that the Commission waive Section 1.115(c) and assume jurisdiction over all matters relating to the settlement agreement. Because the Board denied the then pending petitions for reconsideration, this proceeding is now properly before us, and the petition for waiver is therefore moot.

casting Limited Partnership (HBLP);[4] (f) Petition for Acceptance of Applications, filed September 26, 1986, by Hispanic Broadcasting Systems, Inc. (HSB); (g) Opposition to Petition for Acceptance, filed October 15, 1986, by Hallmark Acquisition, Inc.; (h) Opposition, filed October 15, 1986, by Bahia de San Francisco Television Company; (i) Consolidated Reply in Support of Petition to Accept Applications, filed October 29, 1986, by Hispanic Broadcasting Systems, Inc.; (j) Application for Review, filed December 29, 1986, by Spanish American League Against Discrimination (SALAD); (k) Application for Review, filed November 10, 1986, by Coalition for the Preservation of Hispanic Broadcasting (Coalition); (l) Application for Review, filed December 29, 1985, by Rene Anselmo and Seven Hills Television Company; (m) Application for Review, filed December 29, 1986, by Hispanic Broadcasting Limited Partnership (HBLP); (n) Consolidated Opposition to Applications for Review, filed January 12, 1987, by the Mass Media Bureau; (o) Consolidated Opposition to Applications for Review, filed January 12, 1987, by SICC, Bahia and Fouce Amusement Enterprises, Inc.; (p) Opposition to Applications for Review, filed January 13, 1987, by Rene Anselmo and Seven Hills Television Company; (q) Request for Termination of Waiver, filed February 7, 1986, by

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[4] In its Reply, HBL claims that SICC's Opposition contains "scandalous" material that impugns HBL's good faith in filing the petition for acceptance and that it should be stricken as a "scandalous pleading" in violation of Section 1.52 of the Rules. We will not strike SICC's Opposition to HBL's Petition for Acceptance. In our view, SICC's opposition does not contain any material that is scandalous or that should be stricken under Section 1.52 of our rules. In this regard, we expect attorneys to represent their clients zealously. Here the allegations stopped short of suggesting illegal conduct, and therefore did not exceed the bounds of the law. *Compare City of New York Municipal Broadcasting*, 39 RR 2d 102, 103 (1976) (undue influence on Commission staff alleged); *TeleCable Corp.*, 18 FCC 2d 476, 477-78 (1969) (Commission staff alleged to have been prejudiced); and *Television Broadcasters, Inc.*, 1 FCC 2d 970, 973 (1965) (unsupported allegation that an applicant's survey was based on false information).

Station Representative Association, Inc. (SRA); (r) Petition for Termination of Rulemaking and Waiver, filed March 10, 1986, by Caballero Spanish Media, Inc. (Caballero); and (s) Opposition, filed June 14, 1986, by SIN, Inc. (SIN).

Petitions to Accept Applications

3. We will deny the Petitions for Acceptance of Applications filed by HBL and HBS. Both groups ask us to accept for filing CP applications that would be mutually exclusive with the above captioned SICC/Bahia renewal applications.[5] For the reasons set forth below we conclude that the CP applications may not be accepted under our cut-off rules, which provide that competing CP applications must be filed within 90 days after the renewal application is filed, and that waiver of our cut-off rules would not, under the circumstances of this case, serve the public interest.

4. Petitioners are not entitled as a matter of right to file competing CP applications for SICC's Stations WLTV (Miami) and KWEX (San Antonio) because they missed our cut-off dates.[6] The renewal applications for the Miami

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[5] HBL and HBS have tendered competing CP applications for Stations KWEX-TV (San Antonio, Texas), KMEX-TV (Los Angeles, California), KDTV (San Francisco, California), KFTV (Hanford-Fresno, California), and WXTV (Paterson, New Jersey). HBL also has filed a competing application for Station WLTV (Miami, Florida).

[6] Section 73.3516(e) of our rules specifies, in pertinent part, that a CP application "will not be accepted for filing if it is mutually exclusive with an application for renewal of license of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term. (1) If the license renewal application is not timely filed as prescribed in Section 73.3539, the deadline for applications mutually exclusive therewith is the 90th day after the FCC gives public notice of that it has accepted the late-filed renewal application for filing . . . ." Section 73.3539 provides that the renewal application normally must be filed by "the first day of the fourth full calendar month" before the end of the license term.

and San Antonio Stations were filed on October 1, 1981 and April 1, 1983, respectively, and the cut-off dates for filing competing applications were January 1, 1982 and July 1, 1983, respectively. The petitions for acceptance of applications were filed on September 26, 1986, and on December 9, 1986, years after the cut-off dates.

5. Section 307(c) of the Communications Act automatically extends the license term pending final resolution of a renewal proceeding. The renewal applications for the six SICC/Bahia stations were designated for consolidated hearing on May 26, 1983. Because they remain in active hearing status,[7] none of the SICC/Bahia stations were required to file subsequent renewal applications that would have otherwise been due.[8] Thus, no window has opened for the filing of mutually exclusive applications for any of these facilities after the initial opening of windows in 1981 and 1983, which closed long ago. *See Committee for Open Media* v. *FCC*, 543 F.2d 861, 872 & n.70 (D.C.Cir. 1976);

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[7] There is no merit to HBS' argument that this case is no longer in active hearing status because a settlement agreement is pending before the Commission. Under Section 1.65 of our rules, as long as this Memorandum Opinion and Order is subject to appeal, this adjudicatory proceeding remains unresolved and therefore in active hearing status. There is likewise no merit to HBS' claim that, in view of the Initial Decision's determination that these licensees are basically unqualified, the channels at issue in this proceeding are vacant and therefore available for the filing of competing applications. The Initial Decision has not become final, and, as explained above, the proceedings concerning the frequencies now occupied by SICC/Bahia do not become final until this adjudicatory case is terminated.

[8] Section 73.1020(a) of our Rules provides that licenses for TV stations will ordinarily be renewed for five years and specifies the date that license terms expire according to the geographic location of each station. Thus, the first license term after designation would have expired on February 1, 1987 for Station WLTV in Miami, Florida; on August 1, 1983 for Station KWEX in San Antonio, Texas; on December 1, 1983 for the three California stations - Stations KMEX (Los Angeles), KDTV (San Francisco), and KFTV (Hanford); and on June 1, 1984 for Station WXTV in Paterson, New Jersey.

United Broadcasting Co., 100 FCC 2d 1574, 1578 & n.11 (1985); *Faith Center*, 99 FCC 2d 1164, 1167 (1984); *Faith Center*, 89 FCC 2d 1054, 1058 & n.10 (1982); *Faith Center*, 86 FCC 2d 891, 893 & n.10 (1981); *RKO General, Inc.*, 82 FCC 2d 291, 309 (1980), *vacated on other grounds*, 685 F.2d 708 (D.C. Cir. 1982).

6. There is no merit to HBL's claim that a valid cut-off date for filing competing CP applications was never established for SICC's San Antonio facility (Station KWEX). The renewal application for San Antonio was filed on April 1, 1983, and the cut-off date for competing applications was July 1, 1983. Thus, the Commission did, as HBL notes, designate the San Antonio renewal application for hearing before the 90 day cut-off period for filing competing CP applications has expired. Ordinarily the Commission refuses to accept competing applications after a renewal application has been designated for hearing. However, the Commission's May 26, 1983 Designation Order, 48 Fed. Reg. 28549, para. 6 (pub. June 22, 1983), affirmatively stated that competing applications for the San Antonio station would be accepted until the usual July 1, 1983 cut-off date. Because the press release announcing our May 26, 1983 action did not indicate that we would continue to accept applications for San Antonio until July 1, 1983, HBL maintains that the public did not have actual notice of the July 1, 1983 cut-off date until our May 26 Order was published in the Federal Register on June 22, 1983. Based upon this "confusion" during a substantial portion of the 90 day cut-off period, HBL claims that we must accept competing applications for the San Antonio station.

7. We will not accept competing applications filed more than 3 years after the San Antonio cut-off date based upon idle speculation that someone might have been precluded from filing a competing application because of some confusion about the acceptability of CP applications after the May 26, 1983 designation order. It is well established that

a press release is not an official document having any legal significance. *MCI* v. *FCC*, 515 F.2d 385 (D.C. Cir. 1985). The May 26, 1983 designation order explicitly stated that competing applications would continue to be accepted until the July 1, 1983, cut-off date. Furthermore, HBL does not claim that it, or anyone else, was actually confused as to the cut-off date. Nor did anyone come to the Commission in 1983, and claim that it had intended to file a competing CP application, but that it was prevented from doing so because it was confused as to the cut-off date. Absent a showing that anyone was actually deterred from filing a CP application, waiving our "cut-off" rules to accept the tendered applications would not serve the public interest.[9]

8. Nor is there any public interest justification for accepting petitioners' remaining applications. With regard to Miami, HBL concedes that under the Commission's policy of not accepting CP applications where a prior renewal application is in hearing, SICC was not required to file the renewal application that would have otherwise been due on October 1, 1986, and thus no window opened for the filing of competing CP applications.[10] HBL submits, however, that there is a substantial public interest in pro-

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[9] In this regard, HBL's reliance on *Green County Mobilephone, Inc.* v. *FCC*, 765 F.2d 235 (D.C. Cir. 1985), which involved an application that was tendered for filing three *minutes* late, is misplaced. *Compare Denton Channel Two Foundation, Inc.*, 85 FCC 2d 983, 985 (1981), where the Commission granted a 90 day waiver to a citizens group that demonstrated its inability to file a substantially complete application before the cut-off date; and *Baker-Smith Communications Co.*, 67 FCC 2d 548, 550-52 (1978), where we granted waiver requests which persuasively demonstrates that a waiver would serve the public interest and which complied with the 30 day filing period that we previously established for waiver requests in *George E. Cameron, Jr. Communications*, 56 FCC 2d 752, 761 & n.9 (1975).

[10] If this case were not still in hearing, the license term for the Miami station would have expired on February 1, 1987, the renewal application would have been due on October 1, 1986, and the cut-off date for competing CP applications would have been January 1, 1987.

moting competition in broadcast licensing which precludes the Commission from protecting licensees indefinitely from competition, and that these CP applications should be accepted because the potential for procedural disruption in this case is minimal. The substantial public interest in competition in broadcast licensing that has been noted by HBL and recognized by the courts[11] does not warrant the Commission changing its well-established policies. Contrary to HBL's assertion, we cannot waive our cut-off rules and accept CP applications filed more than 3 years after the cut-off date without seriously compromising our licensing process in general and, in this case, without substantially disrupting this proceeding. Even if acceptance of these applications did not, as HBL urges, require relitigation of issues bearing upon SICC/Bahia's basic qualifications, full consideration of petitioners' late-filed applications would require evidentiary hearings on petitioners' qualifications and on the standard comparative issue. Thus, acceptance of the late-filed applications would prolong indefinitely the resolution of this proceeding. As the court has recognized, such delay does not serve the public interest because "[t]here must be some point in time when the Commission can close the door to nonparties to a comparative hearing or, at least hypothetically, no licenses could ever be granted," *Radio Athens, Inc. (WATH)* v. *FCC*, 401 F.2d 398, 400-01 (D.C. Cir. 1968).

9. Because our cut-off rules serve the public interest in this manner, we will not waive those rules to accept late filed applications absent a compelling justification for such a waiver. *See City of Angels Broadcasting* v. *FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984). We find no such justification in this case. The fact that competing applications would offer us a choice of licensees does not offset the

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[11] *See City of Angels Broadcasting, Inc.* v. *FCC*, 745 F.2d 656 (D. C. Cir. 1984); *New South Media Corp.* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982); and *Committee for Open Media* v. *FCC*, 543 F.2d 861 (D.C. Cir. 1976).

substantial disruption that their acceptance would cause. *See RKO General Inc. (KHJ-TV)*, 94 FCC 2d 879, 886-86 (1983); *RKO, General, Inc. (WNAC)*, 89 FCC 2d 297, 320-21 (1982). The Commission did not defer action on the SICC/Bahia renewal applications or otherwise insulate these licensees from competition indefinitely. Rather, this is an ongoing adjudicatory proceeding.[12] Further, petitioners have not explained why they were unable to file competing applications during the regular 90 day cut-off period. Moreover, under current practice the public will, in view of our action herein, have an opportunity to file competing applications against the San Antonio, Texas and the three California stations in 1988, against the Paterson, New Jersey station in 1989, and against the Miami, Florida station in 1992. *See* Section 73.1020(a) of our Rules.

10. We also reject petitioners' contention that we must accept the competing CP applications because SICC is guilty of misconduct that has compromised the integrity of the Commission's processes. HBL submits that SICC has harassed and intimidated Spanish Radio Broadcasters of America, Inc. (SRBA). It alleges that SRBA acquiesced in the proposed settlement agreement primarily because SICC agreed to dismiss various antitrust suits which it initiated against SRBA shortly after the May 26, 1983 designation order. SICC has not, as HBL claims, forfeited any right to claim the protection of the cut-off rules. As an initial matter, our cut-off rules are designed to interject order and finality into our proceedings. *Committee for Open*

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[12] *See Carlisle Broadcasting Associates*, 59 FCC 2d 885, 887 (1976); and *Committee for Open Media* v. *FCC*, 543 F.2d at 872 & n.70, where the court noted that the Commission distinguishes between renewal applications in hearing status and those that have been deferred. *Compare New South Media* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982), where the court concluded that where action on a previously filed renewal application has been deferred, excusing the filing of subsequent renewal applications improperly foreclosed an otherwise available opportunity for the filing of competing applications.

Media v. *FCC*, 543 F.2d 861, 873 (D.C. Cir. 1976); *Denton Channel Two Foundation, supra*, 85 FCC 2d at 984. In this manner the cut-off rules protect the public against the disruption of service that prolonged consideration of a renewal application would cause. That they also protect the renewal applicant from latecomers, such as HBL, is incidental to this fundamental purpose. Thus, the cut-off rules are applicable, without regard to a licensee's basic qualifications.

11. Furthermore, the mere allegation that SICC improperly harassed SRBA through the filing of various antitrust actions does not rise to the level of misconduct that would taint this proceeding and require us to open this proceeding to additional applicants. SRBA does not claim that it was harassed by SICC. Moreover, the fact that the lawsuits were ultimately dismissed does not mean that they were frivolous or designed to, as petitioners suggest, coerce SRBA into withdrawing its opposition to the renewal of SICC's licensees. Nor are we persuaded by the timing of the lawsuits alone that SICC has engaged in misconduct that taints the integrity of our processes. Moreover, HBL's petition merely reiterates allegations that were previously presented to, and explicitly rejected by, the Administrative Law Judge. *SICC*, FCC 84M-490, released January 30, 1984. Under these circumstances, we conclude that petitioners have not met the heavy burden of demonstrating that this adjudicatory proceeding has become tainted, and that we must begin anew with a fresh cast of applicants.[13]

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[13] *Compare City of Angeles Broadcasting, Inc.* v. *FCC*, 745 F.2d 656, 665 & n.12 (D.C. Cir. 1984), and the cases cited therein, where the court indicated that the presence of *ex parte* contracts would cast such doubt upon the integrity of our proceedings as to require us to initiate a different proceeding open to new applicants. The unproven allegation of harassment is far less egregious than an *ex parte* violation, because the former would not undermine our decision-making process.

Settlement Agreement

12. Having concluded that we will not accept petitioners' competing CP applications for filing, we now turn to the more difficult question of whether the settlement agreement approved by the Review Board serves the public interest. For the reasons that follow, we find that the Board properly approved the settlement agreement and terminated this adjudicatory proceeding with respect to SICC and Bahia. Accordingly, we affirm the Board's Memorandum Opinion and Order, 1 FCC Rcd 92, *recon. denied*, 1 FCC Rcd 844 (1986), and adopt the findings set forth therein, except as specifically modified herein.[14]

13. Rene Anselmo/Seven Hills, SALAD, HBLP (formerly HBL) and Coalition[15] seek Commission review of the Board's action which approved the settlement agreement,

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[14] Anselmo requests that we set a schedule for briefing and oral argument. HBLP also requests that we afford the parties an opportunity to file briefs. We do not believe that briefs or oral argument would significantly contribute to our understanding of the matters raised in the applications for review.

[15] SALAD, HBLP (formerly HBL) and Coalition are not parties to this proceeding, and Anselmo challenges their standing to file applications for review. The Board denied petitions to intervene filed by SALAD and HBLP, but SALAD and HBLP nevertheless seek Commission review of this ruling. In its application for review, Coalition for the first time requests permission to participate in this proceeding. Coalition seeks to participate on essentially the same grounds that SALAD argued before the Board. Although the Board's analysis of the intervention question is sound and its rationale logically encompasses Coalition's intervention request, it would be helpful, in view of the importance of the issues raised here, to have the views of Coalition, HBLP, and SALAD on the difficult questions raised by the proposed settlement. Thus, we will allow Coalition, SALAD and HBLP to participate as *amici curiae* and accept their applications for review as *amici* briefs. *Horne Industries, Inc.*, 98 FCC 2d 601, 602 (1984); *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262 & n. 3 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984).

conditionally granted the renewal applications for the SICC/Bahia stations, and terminated this adjudicatory proceeding with respect to SICC and Bahia. They note that the renewal applications for stations licensed to SICC, Bahia and Seven Hills were designated for hearing on a basic qualifications issue, that the ALJ found that all three licensees were basically unqualified (Initial Decision, para. 176), and that the Review Board approved the settlement agreement without addressing the merits of ALJ's determination that the renewal applications should be denied.[16]

14. As petitioners correctly note, we generally do not permit a licensee with unresolved basic qualifying issues to sell its station at full market value. *See, e.g., Jefferson Radio Company* v. *FCC*, 340 F.2d 781 (D.C. Cir. 1964). The premise of this prohibition is that "a licensee . . . has nothing to assign or transfer unless and until he has established his own qualifications," *Northland Television, Inc.*, 42 RR 2d 1107, 1110 (1980). Int his regard, we are reluctant to permit basically unqualified licensees to avoid the consequences of their misconduct by transferring their licenses to third parties at full market value. *Northwestern Indiana Broadcasting Corp.*, 60 FCC 2d 205, 209-10 (1976). A primary objective in this respect is the deterrence of licensee wrongdoing. *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026, 1028 (1980).

15. As the Board found, the proposed settlement agreement does not fall within the limited circumstances—distress sales, and bankrupt or physically disabled transferors—where we have permitted transfers despite unresolved qualifying issues.[17] However, we are "vested

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[16] Exceptions to the Initial Decision were filed on April 16, and 17, 1986. The exceptions filed by Seven Hills are still pending before the Review Board.

[17] The applications for review argue that the Board's reliance on *George E. Cameron, Jr. Communications*, 56 RR 2d 825 (1985), is misplaced. In *Cameron* the Commission approved a settlement agreement

with broad discretion in our choice of remedies," *WMOZ, Inc.*, 3 FCC 2d 637, 639 (1966). Thus, we are not limited to these recognized exceptions to *Jefferson Radio*. In accordance with our broad mandate to serve the public interet and our obligation to give a "hard look" to waive requests, *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), we must determine whether permitting the proposed sale to a qualified, unrelated buyer would, despite the ALJ's finding of a statutory violation, serve the public interest. For the reasons that follow, we are satisfied that the proposed sale will serve the public interest without compromising our ability to enforce our rules and regulations or undermining the integrity of our adjudicatory proceedings.

16. The Commission designated this renewal proceeding for hearing because there were serious questions as to whether the stations licensed to SICC, Bahia and Seven

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whereby opponents to a renewal application would withdraw from the proceeding and the renewal applicants' station would be transferred to a corporation headed by a former creditor of the station that was found guilty of an unauthorized transfer of control. The Commission found that the transferee's actions following the unauthorized transfer of control mitigated the potential harm and served the public interest in continued broadcast service. Moreover, under the terms of the agreement none of the station's principals would receive any compensation and the transferee would receive no windfall. The applications for review contend that the Board's treatment of *Cameron* impermissibly creates a very broad exception for "unusual and complex" proceedings to the Commission's general prohibition against transfers by unqualified licensees. As set forth below, we are approving the settlement agreement, despite the ALJ's finding that SICC/Bahia violated Section 310(b) of the Act, because we are persuaded that the settlement agreement will adequately remedy any alien ownership problems at the SICC/Bahia stations without compromising our ability to enforce our rules and regulations. Under these circumstances, we find that the settlement agreement serves the public interest. In reaching this conclusion, we do not rely in any respect on *Cameron*. Thus, we need not determine whether *Cameron* creates an exception for "unusual and complex" cases or whether *Cameron* should, as the Mass Media Bureau contends, be strictly limited to its facts.

Hills were under alien control in violation of Section 310(b) of the Communications Act. *SICC*, 48 Fed. Reg. 28,549, para. 3 (pub. June 16, 1983). In doing so, the Commission did not foreclose the possibility that a settlement agreement among the parties would resolve these alien ownership problems. *See* Concurring Statement of Commissioner Henry M. Rivera, which "beseech[ed] the parties . . . to continue negotiating . . . while the hearing process continues . . ." (released June 30, 1983). In accordance with the Commission's essentially remedial concern in designating this case for hearing, the settlement agreement, as approved by the Board, will cure any Section 310(b) violations to the extent that they may currently exist at the SICC and Bahia stations. The agreement precludes principals of SICC and Bahia from becoming officers or directors of the assignees, from acquiring an equity interest in the assignees for two years, and from acquiring more than 5% equity interest in the assignees thereafter. Thus, approval of the agreement, which provides for the sale of the stations to qualified and unrelated buyers,[18] serves the public interest by removing licensees expeditiously that may be unqualified by reason of alien control, thereby ensuring immediate compliance with the statute at the SICC/Bahia stations.

17. Moreover, we are persuaded by the nature of the conduct in this case that approving the settlement agree-

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[18] Consistent with the terms of the settlement agreement, SICC has agreed to sell its stations to a joint venture comprised of Hallmark Cards and First Capital Corporation of Chicago, and Bahia has agreed to sell Station KDTV (San Francisco, California) to SICC Acquisition Corp. Assignment applications for the SICC and Bahia stations are pending before the Mass Media Bureau which will determine whether the assignees are basically qualified to be Commission licensees. Because the qualifications of the proposed assignees are outside the scope of this Order, it would be inappropriate at this time to address any argument that the assignment of the SICC/Bahia licenses to non-minority buyers would not serve the public interest.

ment will not unacceptably diminish the incentives that exist for compliance with our rules and regulations. Section 310(b)(3) of the Communications Act (47 U.S.C. §310(b)) prohibits the grant of a broadcast license to a corporation that has more than 20% alien ownership or that has an alien officer or director. The ALJ found only a technical violation of the law based primarily on the interlocking relationships between Anselmo, SIN, and the licensees. Thus, at the time of the Initial Decision, Rene Anselmo, who is an American citizen, was president and a major stockholder in SICC, Bahia and Seven Hills.[19] (*Initial Decision*, paras. 7-10.) At the same time, he was president and a 25% owner in SIN,[20] which was 75% owned by Televisa, a Mexican corporation controllec by the Azcarraga family. (*Initial Decision*, para. 29.) The ALJ found that SICC, Bahia and Seven Hills are American corporations, and that all of their respective stockholders and officers are American citizens or corporations, but that the Azcarraga family has a 20% interest in SICC,through the Laura Investment Co., that was voted by Anselmo. (*Initial Decision*, paras. 7-10 and 165.) Thus, the direct, outright ownership of the stations by the Azcarraga family never exceeded the 20% limit on alien ownership set forth in Section 310(b) of the Communications Act. (*Initial Decision*, paras. 11 and 162.) However, based upon the historic ties between the licensees and the Azcarraga family and its corporate interests,[21] the composition of the ownership

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[19] Bahia is the licensee of Stations KDTV in San Francisco, and Seven Hills is the licensee of Station KTVW in Phoenix. The remaining stations are licensed to SICC.

[20] Rene Anselmo has resigned as the president of SICC and Bahia.

[21] Not only has Reno Anselmo worked with the Azcarraga family for 30 years (*Initial Decision*, para. 168.), but his interest in the licensee corporations, as well as that of his longtime associates Emilio Nicolas, Sr. and Daniel Villanueva, was largely financed by the Azcarraga family. (*Initial Decision*, paras. 92, 160.) In addition, Emilio Azcarraga Vidauretta had, through various indirect mechanisms, such as deferring

and the boards of directors of the licensee corporations, and the stations' management and programming,[22] the ALJ concluded that "alien influence and direction . . . greatly exceed[ed] that permitted by Section 310(b)." (*Initial Decision*, para. 176.)

18. As noted above, Seven Hills' exceptions to the Initial Decision are pending before the Review Board, which has stayed the Seven Hills renewal proceeding pending Commission action on the SICC/Bahia settlement.[23] Thus, Seven

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payment of monies owed by the stations to Azcarraga controlled programming distributors, funded the stations' operations. (*Initial Decision*, para. 47 and 161.)

[22] The licensees depend on SIN for 75-90% of their programming. (*Initial Decision*, para. 172.) Their network affiliation agreements with SIN require that they share all revenues, including local sales revenues, with SIN. (*Initial Decision*, para. 173.) The "Univision sales concept," an agreement between SIN, Televisa (a media conglomerate in Mexico) and SICC, prohibited the stations from underselling Televisa on commercials contained in SIN programming. (*Initial Decision*, paras. 59, 171.) Finally, the station managers, who were chosen by Anselmo, reported to Anselmo on various matters, including all non-routine matters. (*Initial Decision*, paras. 125, 120, 121, 165.)

[23] *Seven Hills Television Co.*, 2 FCC Rcd 511 (1987). The Board's stay order is not before us, and we express no opinion upon the propriety of the Board's determination to stay the Seven Hills proceeding. However, to the extent that the Board suggests (2 FCC Rcd at 512 & n.8) that the "residual" Seven Hills proceeding could be dismissed as moot if the SICC/Bahia settlement agreement were approved, we disagree. As we have explained, we approve the settlement agreement because we find, *inter alia*, that it will adequately alleviate any alien ownership problems that may exist at the SICC/Bahia stations. In this regard, we rely specifically on the settlement agreement which restricts the interest that any Bahia/SICC stockholder may have in the buyer corporations. Because Seven Hills and Rene Anselmo are not parties to the settlement agreement, there is no comparable assurance that any alien ownership problems that may exist at Seven Hills' station have been resolved. In light of our responsibility to enforce Section 310(b)(3) of the Act, the renewal application for Seven Hills' Station KTVW-TV (Phoenix, Arizona) cannot be granted until Seven Hills' basic qualifications to continue operating its stations are affirmatively established.

Hills' exceptions are not before us, and it would be premature for us to address the validity of the ALJ's conclusion that Seven Hills is basically unqualified at this time. Without considering the merits of the ALJ's conclusion that these three licensee corporations, "as they are presently structured," are basically unqualified (*Initial Decision*, para. 176), we note, as the Board did, the unique contribution that these licensees have made to broadcasting over the past 25 years. *See SICC*, 1 FCC Rcd at 94. Indeed, the Commission has, as the Board noted (*Recon. Order*, 1 FCC Rcd 844, para. 8), unconditionally renewed their licenses for the past 20 years despite the fact that much of the information giving rise to the *de facto* control issue against these licensees was a matter of public record throughout that period. *See SICC*, 5 RR 2d 3, 5-7 (1965), where the Commission refused to add an alien ownership issue against a predecessor of SICC based upon allegations concerning Emilio Azcarraga's involvement in the application for a television station in Paterson, New Jersey; the fact that the Azcarraga Mexican network would program the proposed station; and Anselmo's involvement with the Mexican network, the New Jersey applicant, Stations WMEX and KWEX, and the predecessor of SIN.

19. By considering these factors, however, we do not mean to ignore our statutory responsibility under Section 310(b) of the Act to prohibit alien control or ownership of licensees. Neither the licensees' record nor the Commission's routine grant of their renewal applications over the past 20 years is relevant in determining whether these stations were under alien control in violation of the statute. Nor do these matters create any equities that would require us to excuse or otherwise overlook a significant Section 310(b)(3) violation. Although we have not reviewed the ALJ's ultimate conclusions that these licensees have violated the statute and that they are basically unqualified, even if the ALJ's findings of a Section 310(b) violation is upheld in the Seven Hills proceeding, some remedial action

would follow, *see Declaratory Ruling Concerning Citizenship Requirements*, 103 FCC 2d 511, 517-18 (1985), *clarified*, 1 FCC Rcd 12 (1986).

20. In such an event, we would have discretion in fashioning a remedy for a previous Section 310(b) violation. Thus, we could, consistent with our statutory responsibility under Section 310(b), grant the SICC/Bahia renewal applications subject to the immediate transfer of the stations to unrelated, qualified buyers who have no alien owners. In our view, a conditional grant is particularly appropriate here because there is no indication that these licensees concealed their activities from the Commission and because there are no adjudicated character violations that relate to the licensees' truthfulness and reliability. *Compare RKO General, Inc.*, 1 FCC Rcd 1081, 1084 (1986), where the Commission permitted the assignment despite adjudicated findings of misrepresentation/lack of candor; and *ASD Answer Service, Inc.*, 1 FCC Rcd 751, 754 (1986), where the Commission approved a settlement agreement despite adjudicated findings of lack of candor and misrepresentation. Under these circumstances, we conclude that, even if SICC and Bahia have violated Section 310(b) of the Act, the public interest would be better served by permitting the proposed sales to non-alien buyers than by pursuing the question of the basic qualifications of SICC and Bahia to continue operating their stations.

21. In making this judgment, we note that this is a case of first impression. As the ALJ indicated, virtually all previous Section 310(b) cases have involved determining whether a proposal will violate the statute prospectively. *See, e.g., Telemundo Inc.* v. *FCC*, 802 F.2d 513 (D.C. Cir. 1986); and *Venture Broadcasting Co.* v. *FCC*, 765 F.2d 184 (D.C. Cir. 1985). Because our focus in these cases has been on ensuring future compliance with the statute, we have not had a reason to consider whether previous Section 310(b) violations warrant sanctions in addition to remedial actions. Although the lack of guidance in this area may

not affect the licensees' culpability under the statute, it is pertinent in determining whether we can permit the sale of the SICC/Bahia stations for full market value to non-alien owners, despite the ALJ's conclusion that SICC and Bahia are basically unqualified to be Commission licensees because of their relationship with the Azcarrage family. Given the technical nature of the violation, the absence of any character violations or any other misconduct by these licensees, and the lack of Commission precedent requiring nonrenewal or the imposition of other sanctions for past Section 310(b) violations, we are persuaded that the deterrence value of rejecting the settlement agreement would be minimal, while the benefit of accepting the settlement agreement would be significant. We are further persuaded that the settlement does not undermine the integrity of our adjudicatory process.

22. By designating the renewal applications for all seven of the full power television stations licensed to SICC, Bahia and Seven Hills for hearing, we have indicated that we do not condone Section 310(b) violations and that we intend to evaluate *de facto* control as well as *de jure* stock ownership in enforcing the statutory prohibition against alien ownership. Although SICC and Bahia may, as SALAD and Coalition urge, receive a substantial amount of money for their stations,[24] they nevertheless will surrender, *inter alia*, six very profitable television stations in major markets as a result of our action herein. More importantly, the prompt transfer of these stations to qualified and unrelated buyers will, as noted above, remedy any alien ownership problems that may exist at the SICC/Bahia stations. We do not believe that more is required to deter future

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[24] Once the Commission determines that a transfer will serve the public interest, it does not become involved in setting a sales price for the station or otherwise monitor the amount of profit that a may be realized on the sale. *See RKO General, Inc.*, 1 FCC Rcd at 1082, where the Commission rejected a "windfall profit" to seller argument.

misconduct by SICC and Bahia or by other Commission licensees. Moreover, because the settlement agreement sends a clear message to our licensees that we will vigorously enforce Section 310(b), grant of the licenses subject to their immediate transfer to unrelated, qualified buyers, who are not aliens, fully satisfies our obligation under the statute.

23. The fact that SICC and Bahia will realize nearly $300 million as a result of the proposed sales is not, as the applications for review argue, an absolute bar to the proposed settlement agreement. *See RKO General, Inc. (Station WOR-TV)*, 1 FCC Rcd 1081, 1084 (1986); *ASD Answer Service, Inc.*, 1 FCC Rcd 751, 754 (1986). *See also Grayson Enterprises, Inc.*, 79 FCC 2d 936, 938-40 (1980), *modified, Transferability of Broadcast Licenses*, 53 RR 2d 126 (1983). Nor does approval of the settlement agreement without addressing the merits of the alien ownership issue create any property right, as HBLP argues, contrary to Communications Act.[25] *See RKO General, Inc.*, 1 FCC Rcd at 1084, where the Commission rejected the argument that permitting a transfer, which serves the public interest, improperly creates a "property right" within the meaning of Section 304 of the Act. (47 U.S.C. §304.)

24. Apart from promptly remedying any alien ownership problems with respect to the SICC and Bahia stations, additional public interest considerations support the settlement. This is a complicated proceeding involving licenses held by SICC, Bahia and Seven Hills. Terminating that portion of the proceeding relating to SICC and Bahia will

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[25] HBLP cites Sections 301 and 304 of the Communications Act. Section 301 of the Act provides that "[n]o such license shall be construed to create any right, beyond the terms, conditions, and period of the license." Section 304 provides that "[n]o station license shall be granted . . . until the applicant . . . sign[s] a waiver of any claim to the use of any particular frequency . . . because of the previous use of the same . . . ."

greatly simplify the proceeding and result in substantial administrative savings, even though we still face the task of adjudicating Seven Hills' fitness to retain its Phoenix station. The settlement agreement will eliminate two of the designated issues (Issues (b) and (c))[26] which do not relate to Seven Hills. The elimination of Issue (c), which involves SIN's waiver of Section 73.658(i)[27] for the SICC/Bahia stations, will also facilitate expeditious consideration of the issues raised in rulemaking in Docket 78-309.[28] The

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[26] Issue (b) was specified to determine whether network agreements between SICC and SIN violate Section 73.658(h) of the rules. Issue (c) was specified to determine whether continuation of the Section 73.658(i) waiver that SIN has for the SICC/Bahia stations would serve the public interest.

[27] Section 73.658(i) involves network representation of television stations in national spot sales.

[28] Paragraph 2 of the Settlement Agreement provides that SIN's waiver of Section 73.658(i) of the Commission's Rules (spot sale) will terminate no later than six months after consummation of the transfer. It further provides that "SIN will relinquish the waiver in the context of this proceeding, without prejudice to positions it may take in BC Docket No. 78-309." BC Docket 78-309 is a rulemaking proceeding that involves network representation of television stations in national spot sales. *See Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 78-682, released September 29, 1978, where the Commission initiated the rulemaking and granted SIN a complete waiver of Section 73.658(i) of the Rules to permit SIN to continue operating as national representative for nine stations until the later of October 1, 1979, and 60 days after final decision in the rulemaking proceeding. No final action has been taken on the rulemaking proceeding. In fact, the specification of Issue (c) in this adjudicatory proceeding to determine whether the public interest would be served by continuing SIN's Section 73.658(i) waiver has delayed action in the rulemaking proceeding. Inasmuch as the spot sale waiver issue relates only to the SICC and Bahia stations, the settlement eliminates that issue in the adjudicatory proceeding. Thus, no further impediment exists to prompt consideration by the Bureau of the issues raised in Docket 78-309. Accordingly, we will refer pleadings filed by Caballero Spanish Media, Inc. and Station Representative Association, Inc., which request immediate termination of SIN's waiver, to the Bureau for disposition.

settlement agreement also serves the public interest by terminating the Section 73.658(i) waiver that SIN currently has for the SICC/Bahia stations, which the ALJ concluded no longer served the public interest.

25. Permitting the sale of the SICC/Bahia stations will also expeditiously remove the "cloud" that has surrounded the operation of these stations during the pendency of this adjudicatory proceeding. We have recognized that service to the public may deteriorate during an extended period of uncertainty, *see RKO General, Inc. (WOR-TV)*, 1 FCC Rcd 1081, 1083-85 (1986), *modified on recon.*, 2 FCC Rcd 113 (1987); *Grayson Enterprises, Inc.*, 79 FCC 2d 936, 939 (1980), and that prolonged operation under these conditions does not serve the public interest, *ASD Answer service, Inc.* 1 FCC Rcd 753, 754 (1986). By approving the proposed sale and terminating the adjudicatory proceeding with respect to SICC and Bahia, we can ensure immediate compliance with the law, terminate SIN's Section 73.658(i) waiver for the SICC/Bahia stations, end the uncertainty that was created at these six stations by the Commission's May 26, 1983, designation order, and conserve our resources as well as those of the parties. For all these reasons, we conclude that approval of the settlement agreement would serve the public interest.

26. As the Board recognized (1 FCC Rcd at 93; 1 FCC Rcd at 845), approval of the agreement will further serve the public interest by facilitating the settlement of two federal court cases that involve SICC: a stockholders' derivative suit[29] and an antitrust action.[30] However, although terminating complex litigation is desirable, we are not, as the Board suggests, *obligated* to afford comity to these proceedings under *LaRose* v. *FCC*, 494 F.2d 1145 (D.C.

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[29] *Fouce Amusement Enterprises, Inc.* v. *SICC*, Case NO. CV 76 3451 MRP (C.D. Cal.).

[30] *In re Spanish International Communications Corporation Antitrust Litigation*, MDL No. 596.

Cir. 1974). In *LaRose*, the court indicated that our public interest determination must accommodate the national policy of protecting innocent creditors that is reflected in the federal bankruptcy law. *LaRose* v. *FCC*, 494 F.2d at 1146 & n.2. That case, however, does not create a special exception to the general prohibition against transfers by unqualified licensees that would, by itself, justify the sale of the SICC and Bahia stations to qualified buyers. *See Midstate Broadcasting Company*, 61 FCC 2d 196, 200 (1976), where the Commission indicated that *LaRose* does not require that the Commission eliminate all risk to creditors of bankrupt licensees that are suspected of wrongdoing.

27. Our refusal to renew a license may, as the Board observed in *West Jersey Broadcasting Co.*, 90 FCC 2d 363, 371 (Rev. Bd. 1982), penalized an innocent investor who was not involved in licensee misconduct. *See, e.g., RKO General, Inc.*, 670 F.2d 215 (D.C. Cir. 1981). As the Board properly held in West Jersey, 90 FCC 2d at 373, the Commission does not have an equitable duty to shield such investors from the economic consequences of bad business judgments. Nevertheless, we recognize that federal courts strongly encourage settlements in complex cases as a means of alleviating their overcrowded dockets. *See, e.g., Las Misiones de Bejar Television* v. *FCC*, 772 F.2d 979 (D.C. Cir. 1985). The settlement agreement in this case furthers that public interest objective by removing two such cases from the federal court dockets.

28. As noted above, Rene Anselmo, who is not a party to the settlement agreement, was a principal of SICC and Bahia and still has a controlling interest in Seven Hills. Under the terms of the settlement agreement, no officer, director or shareholder of SICC or Bahia may become an officer or director of the assignees, may acquire an equity interest in the assignees for two years, or may acquire more than a 5% equity interest in the assignees thereafter. By virtue of Anselmo's interest in SICC and Bahia, the restriction applies to Anselmo even though he is not a

party to the settlement agreement and did not consent to the restriction. Anselmo, who is an American citizen, objects to the restriction, which effectively precludes him from purchasing any of the SICC/Bahia stations. He maintains that the Board, having made no finding that the licensee stations were subject to alien control in violation of the Act or that Anselmo was responsible for the violation, cannot restrict Anselmo, who is an American citizen, from participating as a buyer of the SICC/Bahia stations.

29. As Anselmo argues, the Board's approval of the settlement agreement, without addressing the merits of the alien ownership issue, effectively precludes Anselmo from bidding on the SICC/Bahia stations or otherwise participating in their sale. However, having concluded that the settlement agreement otherwise serves the public interest, we will not withhold our approval simply because Anselmo is not a party to the agreement, and we do not reach the question of what course we would follow if Anselmo were a party to the settlement agreement or if the settlement agreement permitted him to continue to participate in the operation of the stations. Anselmo has no statutory right under Section 309(e) of the Communications Act (47 U.S.C. §309(e)) to be included in the settlement agreement or to prevent others from settling the case. *See Anax Broadcasting, Inc.*, 88 FCC 2d 607, 611 & n. 17 (1981), and the cases cited therein. *See also ASD Answer Service*, 1 FCC Rcd at 756, where we refused to delay resolution of an adjudicatory proceeding in order to address the qualifications of former principals that were not parties to the settlement agreement. If Anselmo's basic qualifications are affirmatively demonstrated in the Seven Hills proceeding, the parties would be free to ask us to revise the settlement agreement to permit Anselmo to participate in the assignee corporation. We caution, however, that settlement agreements are private contractual arrangements over which we have only limited control. *Anax*

Broadcasting Inc., 88 FCC 2d at 611. Thus, we could not insist that Anselmo be permitted to acquire an interest in the buyer corporation if the parties were unwilling to deal with Anselmo. Because we find that Anselmo cannot bar the settlement agreement on these grounds, we will, pursuant to our determination that the settlement agreement serves the public interest, permit SICC and Bahia to sell their stations to qualified and unrelated buyers.

30. ACCORDINGLY IT IS ORDERED, That the Petitions for Acceptance of Applications, filed on September 26, 1986, by Hispanic Broadcasting Systems, Inc. and on December 9, 1986, by Hispanic Broadcasting, Ltd. ARE DENIED; and that the applications tendered for filing by Hispanic Broadcasting, Ltd. (File Nos. BPCT-861209KE, BPCT-861209KF, BPCT-861209KG, BPCT-861209KH, BPCT-861209KI, and BPCT-861209KJ) and by Hspanic Broadcasting Systems, Inc. (File Nos. BPCT-860926KS, BPCT-860926KR, BPCT-860926KQ, BPCT-860926KO, and BPCT-860926KT) ARE DISMISSED.

31. IT IS FURTHER ORDERED, That Spanish American League Against Discrimination, Hispanic Broadcsting Limited Partnership, and Coalition for the Preservation of Hispanic Broadcasting ARE GRANTED leave to participate in this proceeding as *amici curiae* and that their Applications for Review ARE ACCEPTED as *amici* briefs.

32. IT IS FURTHER ORDERED, That the Applications for Review, filed on December 29, 1986, by Spanish American League Against Discrimination, Rene Anselmo and Seven Hills Television Company, and Hispanic Broadcasting Limited Partnership, and on November 10, 1986, by Coalition for the Preservation of Hispanic Broadcasting ARE DENIED; that the Board's Memorandum Opinion and Order, 1 FCC Rcd 92 (1986), *recon. denied*, 1 FCC Rcd 844 (1986), IS AFFIRMED, as modified herein; and that, subject to the approval of the applications for assignment of licenses for the SICC stations to Hallmark Acquisition,

Inc. (File Nos. BTCCT-860819KF, BTCCT-860819KH, BTCCT-860819KE, BTCCT-860819KI, BTCCT-860819KG, BTCTT-860819KJ, BTCTT-860819KK, BTCTTL-860819KL, BTCTT-860819KM, and BTCTT-860819KN) and the application for assignment of the license for Station WDTV to SICC Acquisition Corp. (File No. BALCT-861211KZ) and the consummation of the proposed assignments, the above captioned applications filed by SICC (File Nos. BRCT-830401LM, BRCT-800730KM, BRCT-810130KM, BRCT-811001KU, BRCT-800801KJ, BRTT-830201IK, BLTT-810209IM, BPTTL-830829IA, BPTT-840308IL, and BPTTL-830519D8) and by Bahia (File No. BRCT-800703KJ) ARE GRANTED.

33. T IS FURTHER ORDERED, That the Petition for Waiver, filed November 10, 1986, by Hispanic Broadcasting, Ltd. IS DISMISSED as moot.

34. IT IS FURTHER ORDERED, That the Request for Termination of Waiver, filed February 7, 1986, by Station Representatives Association and the Petition for Termination of Rulemaking and Waiver, filed March 10, 1986, by Caballero Spanish Media, Inc. ARE REFERRED to the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

(2) (3)

Nos. 91-120 and 91-130

FILED
SEP 25 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

HISPANIC BROADCASTING LIMITED PARTNERSHIP,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

HISPANIC BROADCASTING SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether disappointed applicants for a broadcast license who did not submit timely applications for the stations in issue can seek judicial review of the Commission's final decision allowing another party to retain its license.

2. Whether viewers of broadcast stations have standing to seek judicial review of a claim that the Commission erred in applying the restrictions on foreign control of broadcast stations set forth in 47 U.S.C. 310(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-120

HISPANIC BROADCASTING LIMITED PARTNERSHIP, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 91-130

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v.

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-24a)[1] is reported at 931 F.2d 73. The order of the en banc court modifying that opinion

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[1] References to Pet. App. are to the appendix to the petition in No. 91-120.

(Pet. App. 25a) is unreported. The opinions of the court of appeals panel (Pet. App. 31a-69a, 28a-30a) are reported at 893 F.2d 1349. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 86a-113a) is reported at 2 F.C.C.R. 3336.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991. Pet. App. 1a. The petitions for a writ of certiorari were filed on July 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the early 1980s Spanish International Communications Corporation (SICC) filed applications for renewal of licenses it held to operate certain television stations. Pet. App. 34a-35a. Under the Commission's rules, the filing of SICC's renewal applications opened a 90-day "window" for applications from other parties who desired to operate television stations on the frequencies in issue. See 47 C.F.R. 73.3516(e). At the time SICC filed its applications, the FCC was investigating whether SICC was controlled by aliens to an extent that would disqualify it from continuing as a broadcast licensee. See 47 U.S.C. 310(b). Accordingly, pursuant to 47 U.S.C. 309(e), the Commission in 1983 designated the renewal applications for hearing to explore the alien control issue. 48 Fed. Reg. 28,549 (1983). The designation order expressly noted that in the case of two of SICC's applications (involving stations in San Antonio and Phoenix), the 90-day window for filing competing applications had not yet closed. *Id.* at 28,549-28,550. Despite the possibility that SICC's

foreign control would cause it to be disqualified, no competing applications were received.

After the hearing, the administrative law judge concluded that the president of SICC was the representative of aliens, in violation of Section 310(b). The ALJ thus denied the renewal applications but recommended that SICC and the Commission explore the possibility of a corporate restructuring that would eliminate the perceived violation of Section 310(b) without requiring SICC to lose its licenses. See *Initial Decision*, FCC 86-D-1 (released Jan. 8, 1986), slip op. ¶ 194. SICC appealed the ALJ's decision to the Review Board.

While the appeal was pending, SICC and all the other parties to the hearing—including the party whose complaint about SICC's ownership had triggered the hearing—entered into a proposed settlement agreement. Under that agreement, SICC's renewal applications would be granted, subject to the condition that SICC sell the stations to an unrelated buyer, Hallmark Cards, Inc., a closely held corporation with no alien stockholders, directors, or officers.[2] The Review Board approved the settlement agreement and granted the renewal applications, conditioned on the proposed transfer. 1 F.C.C.R. 92 (1986).[3]

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[2] Although the alien control issue was tried with respect to all of the SICC stations, the Phoenix station was not part of this settlement agreement. See *Seven Hills Television Co.*, 2 F.C.C.R. 6867, 6868 (Rev. Bd. 1987), reconsideration denied, 3 F.C.C.R. 826 (Rev. Bd. 1988). Rather, the Phoenix station was the subject of a later settlement agreement that petitioners did not challenge. See *Seven Hills Television Co.*, 4 F.C.C.R. 4062 (1989).

[3] Because the Review Board approved the settlement agreement, it had no occasion to rule on SICC's appeal from the ALJ's decision that SICC was unqualified. Thus, the Com-

2. On the day the Review Board adopted its order approving the settlement agreement, petitioner Hispanic Broadcasting Systems, Inc. (HBS) sought to enter the proceeding for the first time by tendering applications for the SICC frequencies. Shortly thereafter, while the Commission was considering whether to uphold the Review Board's approval of the settlement agreement, petitioner Hispanic Broadcasting Limited Partnership (HBLP) also applied for the SICC frequencies. HBLP also claimed viewer standing to oppose the settlement, asserting that its general partner resided within the viewing area of one of SICC's stations.[4]

The Commission rejected the applications from HBS and HBLP as untimely. Pet. App. 90a-97a. The Commission nevertheless exercised its discretion to consider the arguments against the proposed settlement by treating the opponents' pleadings as amicus briefs. *Id.* at 98a. On the merits, the Commission agreed with the Review Board that the settlement was in the public interest, and it found that accepting the settlement would not undermine the agency's interest in deterring alien control of broadcast stations. *Id.* at 98a-110a.[5]

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mission never finally resolved the issue of SICC's qualifications. See Pet. App. 104a.

[4] Two other groups of alleged viewers, who appeared before the court below but have not sought review in this Court, also sought to enter the proceeding for the first time after the Review Board had approved the settlement, while the matter was pending before the Commission.

[5] SICC transferred the licenses to Hallmark shortly after the Commission approved the transfer applications. By acting at that time, Hallmark assumed the risk that it might have to vacate the licenses if the Commission's action was reversed on judicial review. See Pet. App. 28a-30a.

3. On appeal, the panel affirmed the Commission's decision to reject the HBS and HBLP applications as untimely. Pet. App. 46a-49a. A majority of the panel, with Judge Williams dissenting, nevertheless held that HBS and HBLP had standing to challenge the settlement because of their status as potential future applicants if the frequencies ultimately should become vacant. *Id.* at 41a-45a. On the merits of petitioners' challenge to the settlement, the majority remanded the decision for further proceedings, finding that the Commission had not adequately explained its application of the holding in *Jefferson Radio Co.* v. *Federal Communications Commission*, 340 F.2d 781 (D.C. Cir. 1964), that licensees whose qualifications are under investigation generally may not sell their licenses at full market value after a hearing regarding the qualifications has been designated. Pet. App. 49a-56a.

4. On rehearing en banc, the court of appeals dismissed petitioners' appeals from the Commission's decision to approve the settlement. Pet. App. 1a-15a. Relying on its decision in *Spanish International Broadcasting Co.* v. *Federal Communications Commission*, 385 F.2d 615 (D.C. Cir. 1967), the court concluded that "[a]n applicant for a broadcast license must file a timely application with the FCC before he may challenge an adverse Commission order in this court." Pet. App. 9a. The court explained that requiring applicants to participate in the administrative process would promote judicial efficiency by allowing agencies the first chance to assess the merits of an application. In this case, if petitioners had filed timely applications, they might have won the licenses without regard to the foreign control question regarding the competing applicant; alternatively,

their applications might have been rejected on the merits for reasons independent of the foreign control problem. *Id.* at 10a-11a.[6] The court concluded that "nothing in our decision prevents any person who feels aggrieved from appealing an order denying him party status in the administrative proceedings * * *. And if the agency's denial were in error, its denial of status would necessarily excuse later non-participation." *Id.* at 13a.[7]

Petitioner HBLP and others also claimed standing as viewers to challenge the settlement as inconsistent with the alien control provisions set forth in 47 U.S.C. 310(b). The court held that viewers do not have standing to raise this particular challenge because they are not the "intended beneficiaries" of Section 310(b). Pet. App. 13a-14a. The court explained that the provision "was designed to protect the entire nation * * * [by] keeping the airwaves available for military use in time of war," *ibid.*, and concluded that the alleged viewers could thus be seeking review only "as guardians of the national interest." *Id.* at 14a. In the court's view, this "generalized interest . . . is too abstract to constitute a 'case or controversy'

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[6] The court distinguished the "frequent" situation where "compliance with an agency's procedures would not have caused the agency to venture down a path that could have mooted the issue brought to court." The court approved of cases holding that exhaustion requirements are satisfied in those cases when the agency has a "fair opportunity" to address the party's claim. Pet. App. 11a-12a.

[7] Chief Judge Mikva dissented, arguing that petitioners adequately exhausted administrative remedies because the Commission had a fair opportunity to address their arguments, and in fact did address them. Pet. App. 16a-24a.

appropriate for judicial resolution." *Ibid.* (quoting *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. 208, 227 (1974)).[8]

ARGUMENT

1. Petitioners first challenge (91-120 Pet. 4-6; 91-130 Pet. 16-24) the court of appeals' narrow and "unsurprising" holding that "one who seeks to overturn a Commission licensing decision in the capacity of a disappointed applicant must actually apply [for the license], and must do so in timely fashion," Pet. App. 12a. As the court of appeals' treatment of the issue shows and as petitioners implicitly acknowledge, this particular problem arises quite rarely; petitioners can cite no case reaching a contrary conclusion.[9]

Contrary to the claim of petitioner HBLP (91-120 Pet. 4-5), the decision below is not inconsistent with the D.C. Circuit's decision to grant judicial review in

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[8] Because Chief Judge Mikva found that petitioners had standing as applicants, he had no occasion in his opinion at the en banc stage to address the question of viewer standing. His panel opinion, though, suggests that he agreed with the majority's approach. See Pet. App. 41a (noting that the claim of viewer standing "is problematic because there is no evidence to suggest that the anti-alien control provisions of the Act were implemented to advance the public's interest in programming content").

[9] As the court below took pains to emphasize (Pet. App. 13a), its ruling will not deprive parties in petitioners' situation of judicial review of the Commission's disposition of their request to participate in the licensing proceedings. Moreover, if the court ultimately concludes that the agency erred in declining to allow disappointed applicants to participate, the applicants would be entitled to judicial review of the merits of the proceeding from which they were excluded. See Pet. App. 13a; *FCC* v. *NBC, Inc. (KOA)*, 319 U.S. 239, 246-247 (1943).

Shurberg Broadcasting of Hartford, Inc. v. *Federal Communications Commission*, 876 F.2d 902 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 110 S. Ct. 2997 (1990).[10] In that case, as in this one, the Commission denied a party permission to participate in the proceedings on an incumbent licensee's renewal application. In that case, though, the denial was based not on the untimeliness of the application, but on the Commission's conclusion that even if Shurberg entered it would not receive the license, because the Commission planned to resolve the proceeding by a distress sale to a minority-owned entity. See *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1166, 1170 (1984) (denying Shurberg's application). In that case, as in this one, the court of appeals concluded that the disappointed applicant was entitled to challenge his exclusion from the licensing proceeding. Because the court of appeals could not have reviewed Shurberg's exclusion without reviewing the merits of the Commission's decision, the court of appeals correctly reviewed Shurberg's claims regarding the merits of the Commission's decision. In this case, by contrast, the Commission's reason for rejecting petitioners' applications was not linked to the merits of the proposed settlement, so the court of appeals' review of that reason did not require it to consider petitioners' challenge to the merits of the proposed settlement.[11]

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[10] Even if the decision below did conflict with the D.C. Circuit's earlier decision in *Shurberg*, that by itself would not be an adequate reason for this Court to grant review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[11] Petitioner HBLP also suggests (91-120 Pet. 5-6) that the en banc decision deprived it of due process by disposing

Petitioner HBS contends (91-130 Pet. 16-18) that 47 U.S.C. 405 effectively preempts the exhaustion field, so that judicial review is presumptively available to any party that meets the threshold requirements of that provision, however untimely the party's actions may be under the Commission's well-established procedures. But the text of the statute—which does not on its face mandate judicial review, but only lists certain minimum prerequisites for judicial review—does not require a result so inconsistent with an orderly administrative process. The cases on which petitioner relies (91-130 Pet. 17-18 nn.19-21) are inapposite; they involve general exhaustion principles and do not address petitioner's argument that Section 405 precludes courts from requiring parties to comply with agency procedures if they wish to challenge agency proceedings.

Petitioner HBS also argues (91-130 Pet. 18-21) that the decision of the court of appeals is inconsistent with the general purposes of the exhaustion doctrine, which it characterizes as limited to preventing premature judicial intervention in pending administrative proceedings and ensuring that agencies have an opportunity to pass on the questions parties wish to present to courts. See 91-130 Pet. 21. But peti-

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of the case on a ground on which the Commission did not seek rehearing, and which the parties neither briefed or argued. Assuming for the moment that petitioner's assessment of the facts is correct, its contention nevertheless is meritless. The court of appeals could have granted rehearing en banc even if no party had requested it. See *Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, 345 U.S. 247, 262 (1953). There is no merit to petitioner's contention that the en banc court had *less* authority to select a ground of decision because it acted on a petition of one of the parties rather than entirely on its own motion.

tioner completely ignores the rationale of the court of appeals, which reasonably concluded that considerations of judicial and administrative efficiency support a rule requiring petitioners to comply with established deadlines in entering a proceeding they wish to challenge. None of the cases cited by petitioner have addressed or rejected that rationale.

2. Petitioner HBLP also contends (91-120 Pet. 6-13) that the court of appeals erred in holding that viewers do not have standing to challenge the Commission's action under Section 310(b).

Petitioner relies first (Pet. 7-8) on the Commission's apparent willingness to allow viewers to participate before the agency without limitation as to the issues they may raise. Petitioners' reliance is misplaced, though, because the Commission is not constrained by Article III "standing" requirements. See *California Association of the Physically Handicapped, Inc.* v. *Federal Communications Commission*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985). The Commission's willingness to entertain broad submissions from viewers in the public interest does not somehow grant all members of the public standing to obtain judicial review "simply because citizens are the ultimate beneficiaries of" our legal system, *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. at 227.

Petitioner HBLP also contends (91-120 Pet. 9-10) that the court of appeals erred by paying insufficient attention to "Congressional intent" and "the statutory scheme," and suggests that judicial review is appropriate under 47 U.S.C. 309(d)(1). This Section simply establishes the general procedure pursuant to which objections may be filed before the Commission, and thus is entirely irrelevant to the question of

whether petitioners have standing to seek judicial review of the Commission's decision in a court. As the court of appeals recognized, the decisive question is whether viewers are among the intended beneficiaries of the alien control restrictions in Section 310(b); petitioner offers no reason to reject the court of appeals' evaluation of the purpose and history of that provision, see Pet. App. 13a-14a. Petitioner's claim accordingly merits no further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

ROBERT L. PETTIT
General Counsel
Federal Communications Commission

SEPTEMBER 1991

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* The Solicitor General is recused in these cases.

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No. 91-130

IN THE

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OCTOBER TERM, 1991

HISPANIC BROADCASTING SYSTEMS, INC.,
a Delaware Corporation,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM OF PETITIONER HISPANIC BROADCASTING SYSTEMS, INC.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM OF PETITIONER HISPANIC BROADCASTING SYSTEMS, INC.

Petitioner Hispanic Broadcasting Systems, Inc., submits the following Reply to the Brief in Opposition of the Federal Communication Commission.[1]

Petitioner offered three reasons why the novel exhaustion doctrine promulgated by the court below was in error and presented an important issue. Petitioner pointed out, in the first place, that Congress had precisely articulated the preconditions of judicial review in Section 405 of the Communications Act and that the court below had improvidently added an "earliest available corrective step" exhaustion requirement applicable to all agencies; secondly,

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[1] The Interested Parties are set out on page ii of the Petition for a Writ of Certiorari.

that the additional requirements for exhaustion elaborated by the court below were inconsistent with the basic purposes of exhaustion to prevent premature judicial action and to insure that the agency passes upon the issues; and thirdly, that the requirement of an early (and usually useless) intervention in order to challenge a possible future illegal act of an agency would improperly burden both the applicants and the agency itself.

The Commission answers each of these points by stating that, in addition to the historic offices of exhaustion, the court below reasonably added, as further requirement, "a rule requiring petitioners to comply with established deadlines in entering a proceeding it wishes to challenge." FCC Op. 10.[2] The Commission adds, "None of the cases cited by petitioner have addressed or rejected that rationale."

It is a fair question whether the court was free to add the "earliest available [application]" as a precondition to judicial review when Congress in the Communications Act has stated that the precondition for judicial review is "a petition for reconsideration" only where one is not a party to the proceeding or the agency has not had an opportunity to address the issue appealed. And that is one of the Questions Presented. But even if a failure "to comply with established deadlines" may preclude a challenge to the proceeding, it cannot preclude a challenge to the applicability of the "established deadlines" to the applicant. And the precedent of the court below so holds.

Throughout the agency proceeding, and before the lower court, Petitioner acknowledged that it had not filed its

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[2] Similarly, the Commission quotes the court of appeals to the effect that "one who seeks to overturn a Commission licensing decision in the capacity of a disappointed applicant must actually apply [for the license], and must do so in a timely fashion." FCC Op. 7, quoting Pet. App. 12a. As we show in the text, by this formulation, the court below begged the central issue of what is "timely": finding that Petitioner had not filed its application at the earliest possible moment, it held that Petitioner was estopped to argue in court that it was not required to do so.

applications within the Commission's "cut-off" dates for competing applications. Rather, it had filed its applications only when (but as soon as) the hearing officer ruled that the incumbents were not qualified for renewal because they were in violation of the Communications Act's limits on alien ownership, and the agency staff had proposed a settlement permitting these unqualified licensees to renew their license on the sole condition that they sell it immediately for $300 million dollars.

Before the original panel below, Petitioner said:

> HBS did not file its applications for SICC's television channels for the purpose of obtaining comparative consideration with SICC's applications for renewal of its license for those channels. Rather it did so in response to the administrative law judge's finding SICC in violation of Section 310(b) [alien ownership] and denying its pending applications for renewal of licenses for those channels. In the wake of these findings, the channels previously licensed to SICC became available for application by HBS and other parties. [Reply Br. at 6-7]

From the beginning, petitioners relied upon *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257 (D.C. Cir. 1968). In that case, MG-TV filed its application long after the issuance of the construction permit, when it learned that the agency was considering a pending sale of the permit to a third party, even though the permittee had not begun construction of the station by the permit's expiration date. Section 319 of the Communications Act provides that a construction permit "shall . . . be automatically forfeited" if a station is not built within the time specified. The court held that MG-TV's application could not be rejected by the FCC because the FCC had not acted properly in allowing the sale.

The original panel below found *MG-TV* controlling (Pet. App. B, p. 35a; 893 F.2d at 1355):

> [The Commission] conceded at oral argument that if a reversal of its orders would result in vacant licenses, companies eligible to file applications for those licenses would have standing to challenge the Commission's order. *See, e.g. MG-TV Broadcasting v. FCC*, 408 F.2d 1257, 1264 n. 24 (D.C. Cir. 1968) (prospective applicant had standing to challenge assignment of a construction permit where denial of the application would have left the station vacant and available for other applications).

This case, which was central to the Petitioner's claim, both of the right to be heard by the Commission and to its standing to challenge the Commission in court, is ignored in the Commission's brief. Indeed, it is only by ignoring the case that the Commission can say that "[n]one of the case cited by the Petitioner have addressed or rejected that rationale" of the Court of Appeals. FCC Op. 10. MG-TV Broadcasting did not file a competing application within the "established deadlines in entering a proceeding"; however, it did successfully challenge the attempted transfer by the agency after the permit had become forfeit. So here, HBS did not file a competing application within the "established deadlines" after the SICC's original applications; none the less, it did apply for the licenses, and challenged the Commission's effort to permit their transfer, once they had become forfeit by the alienage of the licensee.

It is possible to ignore this precedent only by succumbing to the circular logic of the court of appeals. The court first concluded that Petitioner's application was not "timely" because it had not been filed within the "cut-off" period; then, on the basis that Petitioner was not "timely," refused to allow Petitioner to argue in court that the cut-off dates did not apply to its application under the authority of *MG-TV*.

The court's application of a "timeliness" requirement to deny the Petitioners the opportunity to invoke in court a

case which would have established the timeliness of their applications is indicative of the impropriety of such a requirement, in light of the exhaustion requirements established by Congress in Section 405. Section 405 provides, *inter alia*, that "[t]he filing of a petition for reconsideration shall not be a condition of judicial review" except where the party seeking review "relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass . . . ." In this manner, Congress, on the one hand, widely permitted judicial review to interested parties, while, on the other, assuring that the Commission would have an adequate opportunity to rule on all issues. This is the only role that timeliness is permitted under the Communications Act.

For the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, it is respectfully submitted that the writ should be granted.

Respectfully submitted,

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